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NO.

IN THE

Supreme Court of the United States

SAMANTHA J. COMFORT, ON BEHALF OF
HER MINOR CHILD ELIZABETH NEUMYER, ET AL.,

Petitioners,

v.

THE LYNN SCHOOL COMMITTEE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The City of Lynn, Massachusetts permits school choice within its public schools, but restricts participation on the basis of race. Under Lynn's plan, a transfer request will be denied if the transfer negatively affects the level of racial balance at the sending or receiving school. Racial balance is measured in terms of proportional representation to the system-wide minority student population. The only characteristic considered in granting or denying school choice requests is the race of the child. Lynn's plan does not include any individualized consideration.

The questions presented are:

1. Whether, in public elementary and secondary schools, achieving racial diversity is a compelling governmental interest sufficient to permit race-based restrictions on school assignments.

2. Whether a student assignment plan that mechanically and inflexibly restricts assignments based on the classifications "minority" and "non-minority" meets the Fourteenth Amendment's requirement of narrow tailoring.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following entities and individuals are parties to the action:

As petitioners: Samantha J. Comfort on behalf of her minor daughter Elizabeth Neumyer; Todd and Laurie Bollen on behalf of their minor son Matthew Bollen; Gina M. Leone on behalf of her minor son Troy J. LaMothe Jr.; Leanne Manuel on behalf of her minor daughter Shanice Manuel; Meta Stinson on behalf of her minor daughter Angelica Jackson; Karen Tsaltas on behalf of her minor son Michael A. Tsaltas.

The following parents were parties below, but are no longer parties in this matter: Rhonda Campbell, Karen Agnew, Andrew DiGaetano, Michael Stinson, Jean and William O'Neil, and Janeen Goodwin.

As respondents: The Lynn School Committee; the City of Lynn; Edward J. Clancy, as Mayor and Chairperson of the Lynn School Committee; the members of the Lynn School Committee: Patricia Capano, Donna M. Coppola, Arthur C. Fiste, John E. Ford, Jr., Jeffery T. Newhall, Daniel F. Cahill; Nicholas P. Kostan, as the Superintendent of the Lynn Public Schools; the Commonwealth of Massachusetts; the members of the Massachusetts Board of Education: James A. Peyser, J. Richard Crowley, Harneen Chernow, Judith I. Gill, Ann J. Reale, Roberta R. Schaefer, Abigail M. Thernstrom, and Henery M. Thomas, III.

The following office holders had been named as parties in their official capacities and were replaced by their successors in office as defendants: Charles D. Baker, Frank M. Carrabba, Patricia A. Crutchfield, Madelyn Day Barry, Edwin J. Delattre, Steven F. Duffy, William K. Irwin, Jr., George Mazareas, James Mazareas, William McDonald, Patrick J. McManus, Timothy McManus, Carolyn A. Murphy, Loretta Cuffe O'Donnell.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Samantha J. Comfort, on behalf of her minor child Elizabeth Neumyer, *et al*, respectfully pray that a *Writ of Certiorari* issue to review the decision entered by the United States Court of Appeals for the First Circuit, dated June 16, 2005 (App.1 – 50).

OPINIONS BELOW

The opinion of the *En Banc* Panel of the United States Court of Appeals for the First Circuit (App.1 - 50) is reported at 418 F.3d 1 (1st Cir. 2005). The opinion of the Panel of the First Circuit (App.51 - 90) was reported at 2004 WL 2348505, 2004 U.S. App. LEXIS 21791 (1st Cir. Oct. 20, 2004) and was withdrawn by 2004 U.S. App. LEXIS 24662 (App.96-97). The Decision of the District Court (App.98 - 220) is reported at 283 F.Supp.2d 328, 182 Ed. Law Rep. 156 (D.Mass. 2003).

BASIS OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on June 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States reads in relevant part, "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

The relevant provisions of 42 U.S.C. §§1981, 1983, 1985, 1986, 2000d and the Massachusetts Racial Imbalance Law are reproduced beginning at App.221.

STATEMENT OF THE CASE

I. Background

This case concerns the race-based student assignment plan used by the City of Lynn, Massachusetts. Lynn's public schools permit public school choice, but restrict transfers based on race. Some of the public schools in Lynn do not accept transfers from children who are African-American, Asian or Hispanic. Other schools do not accept transfers from children who are white. The petitioners are a multi-ethnic group of parents from Lynn who challenged the constitutionality of this process.

Naturally occurring housing patterns have resulted in parts of Lynn being predominately white, while other parts of the city are predominantly Asian, Hispanic or African-American. App.6. These housing patterns are typical of cities across America and are nct the result of any action by the City of Lynn. App.45. In other words, Lynn's neighborhoods are *de facto* segregated.

These housing patterns would result in some of Lynn's schools being predominantly white, while other schools would be predominately Asian, Hispanic or African-American. Given that Lynn had a student population that was 58% minority at the time of trial, all of Lynn's schools would have a significant number of minority and non-minority students regardless of the assignment plan used, but each school would not mirror the minority percentage of the system as a whole.

Instead, Lynn's schools would look like the City of Lynn – they would reflect the community's housing patterns. App.45 (Lynn's goal is to prevent "the housing pattern of *de facto* segregation [from being] projected into the school system" (Boudin, C.J., concurring)).

Under the Massachusetts Racial Imbalance Law, communities like Lynn can receive additional state education aid if they adopt student assignment plans that seek to racially balance their schools. *See* Statutory Addendum, App. 222. In 1989, Lynn implemented its *Voluntary Plan for School Improvement and the Elimination of Minority Isolation* in order to qualify for these funds. Lynn is one of twenty-two communities in Massachusetts that have plans adopted under the Racial Imbalance Law.

Even with Lynn's race-based plan, its schools vary widely in their racial composition. At the time of trial, Lynn's schools ranged from 25% to 84% minority. Despite this varying levels of racial diversity, Lynn's schools are equal in quality. The parties stipulated that, at the time of trial, each of Lynn's schools was "comparable in quality, resources, and curriculum." App.6, n. 1. Lynn's own experts found that Lynn's schools were "uniformly positive" in the education and social development they provided. App. 142.

A multi-ethnic group of parents from Lynn challenged Lynn's use of racial restrictions on its school choice program. The first group of parents brought suit in August of 1999 – the *Comfort* plaintiffs. They were joined by a second multi-ethnic group of parents in February of 2001 – the *Bollen* plaintiffs. The *Comfort* and *Bollen* plaintiffs challenge Lynn's use of racial restrictions within the Lynn Plan as violating their children's rights under the Equal Protection Clause and various civil rights statutes. The jurisdiction of the district court was invoked under 42 U.S.C. §1983 and 28 U.S.C. §§1331 (federal question) and 1343 (deprivation of civil right).

Following a trial, the District Court found for the Lynn School Committee and the Commonwealth of Massachusetts, finding racial diversity to be a compelling governmental interest. App.98-220. A Panel of the First Circuit unanimously reversed, finding Lynn's Plan unconstitutional because it failed the requirements of narrow tailoring. App.78.

A sharply divided *En Banc* Panel then upheld Lynn's use of racial restrictions. In doing so, the *En Banc* Panel carved out an exception to the generally disfavored treatment given to discriminatory student assignment plans. The majority held that discriminatory assignment plans are constitutionally permitted if they are adopted to address *de facto* segregation. App.45. The majority concluded that racial diversity is a compelling governmental interest under this Court's recent decision in *Grutter* v. *Bollinger*, 539 U.S. 306, 316 (2003). App.21. The majority went on to hold that the narrow tailoring requirements of *Grutter* are not applicable to racial diversity plans. App.25. The dissenters noted that the Lynn Plan fails the narrow tailoring prong of strict scrutiny as most recently articulated in *Grutter* and in *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). App.48-49.

II. How the Lynn Plan Works

Under Lynn's student assignment plan, each child is guaranteed an assignment to their neighborhood school, called their "district school." The Plan permits school choice. In order to encourage parents to select schools other than their district school, each school has a unique theme. App.49. Parents are also enticed into selecting out-of-district schools because some of these schools "are located near after-school programs or near high-employment areas." *Id.* When a parent wishes to participate in this school choice program, race limits the schools available to their child. App.7-8. The goal of the Plan is to move all schools towards "racial balance," which is measured in terms of "minority" and "non-

minority." *Id.* Transfer requests are denied if they would negatively affect the racial balance at either the sending or receiving school. A racial balanced school is defined as an elementary schools that is within +/-15% of the system-wide minority student population or a high school or middle school that is within +/-10% of the system-wide minority student population. App.7.

REASONS FOR GRANTING THE WRIT

I. Introduction

The decision of the First Circuit represents a radical shift in the limits on the use of racial classifications. School systems across the country are under increasing pressure to racially balance their schools. Under the First Circuit's decision, public schools are free to assign children on the basis of skin color for no other reason than the mistaken and unsupported belief that good education requires a specific racial makeup in the classroom. In order to permit this unfettered use of race in school assignments, the First Circuit has eliminated the usual barriers to government choosing between its citizens on the basis of their race, when done in the name of racial diversity. App. 25-26. This permissive use of race, dooms generations of children to the damaging experience of being turned away at the school house door for having the wrong skin color.

This case raises the question of what limits the Equal Protection Clause of the Fourteenth Amendment places on voluntarily-adopted race-based student assignment plans in the public school setting. As noted by the First Circuit, this Court has not previously addressed voluntarily-adopted race-based student assignment plans that seek to maintain racial balance/racial diversity. App.23. This Court has addressed the use of voluntarily-adopted race-based student assignment plans that create *de jure* segregated schools, *see e.g. Brown* v. *Brd. of Education*, 347 U.S. 483, 493 (1952), but the question of whether *de jure* discriminatory assignment plans can be

used to address *de facto* segregation within public school systems has not been answered by this Court. The Circuit Courts that have considered the issue are divided.

Under the rubric adopted by the First Circuit, public schools are free to utilize non-remedial race-based student assignment plans that use mechanically-applied quotas in order to maintain racial balance (*i.e.* racial diversity). The Lynn Plan uses *de jure* discrimination in student assignments in an effort to address *de facto* segregation in housing patterns. In doing so, the Plan does not provide for any individualized consideration of how a child will contribute, or not contribute, towards "disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial society" – the purported objectives of the Plan. App.19.

This decision is in direct conflict with decisions of other Circuits that have rejected the use of non-remedial race-based school assignment plans designed to maintain racial diversity. Even the Circuit Court judges who reviewed the Lynn Plan are sharply divided. Out of the six appeals court judges to review the Lynn Plan, three have found it unconstitutional, while the other three have found it to be constitutionally permitted.[1]

An additional ground for review by this Court is the failure of the three judge majority of the *En Banc* Panel to follow the standard applied by this Court in similar cases. In its holding that the normal narrow tailoring standard is not applicable where the government's purpose is maintaining racial diversity in public schools (App.25), the *En Banc* Panel relied on the lack of direct guidance from this Court.

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[1] The three judges who made up the original Panel of the First Circuit, Judges Selya and Howard of the First Circuit and Judge Dyk of the Federal Circuit, unanimously found the Lynn Plan unconstitutional. The *En Banc* Panel included judges Selya and Howard, who continued to find the Plan constitutionally infirmed and Judges Boudin, Torruella and Lipez, who found the Plan constitutional.

> [W]e are faced with a local experiment, pursuing plausible goals by novel means that are not squarely condemned by past Supreme Court precedent . . . The Supreme Court has not passed upon a plan anything like the one before us. That Court is free to extend its precedents to the present context, but that is its role--not ours.

App.45 (Boudin, CJ., concurring). This Court should provide that guidance.

II. Argument.

A. The Circuits are divided over whether the Equal Protection Clause permits the use of voluntarily-adopted racial restrictions in K-12 public school assignments.

The decision of the First Circuit directly conflicts with decisions of the Fourth, Fifth and Ninth Circuits concerning voluntarily-adopted race-based student assignment plans designed to advance racial diversity.

The Fourth Circuit examined two such plans in *Tuttle* v. *Arlington County School Board*, 195 F.3d 698, 700 (4th Cir. 1999) *cert. dismissed*, 529 U.S. 1050 (2000) and *Eisenberg* v. *Montgomery County Public Schools*, 197 F.3d 123, 126-27 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000). That Court concluded that because both assignment plans inflexibly used racial balancing in an effort to achieve the purported educational benefits of racial diversity, they violated the Equal Protection Clause. *Tuttle*, 195 F.3d at 705-07; *Eisenberg*, 197 F.3d at 133. In reviewing the plans at issue in *Tuttle* and *Eisenberg*, the Fourth Circuit reached conclusions about the appropriate narrow tailoring standard that directly conflict with the standard applied by the First Circuit. These conflicts are analyzed in turn within the review of the various elements of strict scrutiny *supra*.

More recently, the Fifth Circuit addressed the appropriate narrow tailoring standard for race-based K-12 assignment plans in *Cavalier* v. *Caddo Parish School*

Board, 403 F.3d 246 (5th Cir. 2005). Unlike the First Circuit, the Fifth Circuit concluded that racial balancing plans are not narrowly tailored. *Id.* at 260.

In 2004, the Ninth Circuit addressed an assignment plan similar in many respects to Lynn's. Reviewing a grant of summary judgment for the defendants, a panel of the Ninth Circuit found the Seattle plan insufficiently narrowly tailored based on the requirements spelled out by this Court in *Gratz* and *Grutter*, a standard specifically rejected by the First Circuit's *En Banc* Panel. App.25. *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 377 F.3d 949 (9th Cir. 2004) ("*PIICS*"). A petition for rehearing *en banc* was granted in the *PIICS* case, 395 F.3d 1168 (9th Cir. 2004), and an *En Banc* Panel of the Ninth Circuit heard arguments on June 21, 2005.

The Ninth Circuit also addressed many of the narrow tailoring questions at issue in this case in *Smith* v. *Univ. of Washington*, 392 F.3d 367 (9th Cir. 2004), *petition for cert. filed* (Apr. 18, 2005), which addresses the use of race as a factor in a Law School admission policy. The Ninth Circuit found the admission plan constitutional specifically because it satisfies narrow tailoring requirements, which the Lynn Plan does not. These include: individualized consideration and the lack of specific numerical targets in the Law School's Plan.

The Ninth Circuit has also recently rejected the use of a race-based admission policy at a private school under 42 U.S.C. §1981. *Doe* v. *Kamehameha Schools*, 416 F.3d 1029 (9th Cir. 2005). The Ninth Circuit adopted a standard based on Title VII for its §1981 analysis and found against the mechanical inflexible use of race even under that lower standard.

In *McFarland* v. *Jefferson County Brd. of Educ.*, 416 F.3d 513 (6th Cir. 2005), the Sixth Circuit addressed the constitutionality of two separate assignment processes used by public schools in Louisville, Kentucky. In a brief *per curiam* opinion, the Sixth Circuit adopted the District

Court's findings that one of the two assignment plans was constitutional and the other was not. Some of the characteristics that rendered the second plan unconstitutional can be found in the Lynn Plan, which include race being the determinative factor, rather than a mere "tipping" factor and the lack of individualized examination. *McFarland* v. *Jefferson Cty. Pub. Schs.*, 330 F.Supp.2d 834, 862-63 (W.D. Ky. 2004).[2]

In *Brewer* v. *W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2nd Cir. 2000), the Second Circuit reviewed an order granting a preliminary injunction. The District Court had granted the injunction based on its conclusion that racial diversity could never be a compelling interest. *Id.* at 747. The Second Circuit reversed, holding "we do not think that we can conclude 'clearly'--the plaintiffs' burden in this case--that reduction of racial isolation to ameliorate what may be *de facto* segregation in the voluntarily participating public schools is not a compelling state interest" (*Id.* at 752) and remanded the case for a determination of whether such a plan could meet the requirements of narrow tailoring. *Id.* at 753. The case settled before further proceedings could take place.

The Fourth, Fifth and Ninth Circuits have each found the use of racial balancing assignment plans similar to Lynn's unconstitutional. *Tuttle*, *Eisenberg*, *Cavalier*, *PIICS* and *Kamehameha Schools*. The First Circuit, and to a limited extent, the Second and Sixth Circuits, have upheld the use of racial balancing assignment plans. *Comfort*, *Brewer* and *McFarland*.

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[2] In fact, the individual examination contained within the Louisville assignment plan upheld by the Sixth Circuit lacks any meaningful flexibility or individualized consideration. *See*, *McFarland*, 330 F.Supp.2d at 842 ("the 2001 Plan requires each school to seek a Black student enrollment of at least 15% and no more than 50%"). The plan upheld in *McFarland* could not survive the narrow tailoring analysis of *Grutter*.

B. In its failure to apply this Court's decisions in comparable cases, the First Circuit cited an absence of any guidance from this Court in the specific area of voluntarily-adopted race-based student assignment plans. This Court should provide that guidance.

The First Circuit approved the very practices rejected by this Court in *Gratz* and *Grutter* – the use of inflexible, mechanically-applied quotas to achieve diversity measured by race alone. *Grutter*, 539 U.S. at 316 ("The [law school] policy does not define diversity 'solely in terms of racial and ethnic status'") and *Gratz*, 539 U.S. at 270 (a policy that automatically benefits an "applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity").

The *En Banc* Panel attempts to justify its decision to disregard this Court's recent *Gratz* and *Grutter* decisions by finding that, "[t]he Lynn plan at issue in this case is fundamentally different from almost anything that the Supreme Court has previously addressed." App.43 (Boudin, C.J., concurring). But as the dissenters correctly noted, "[t]he majority accentuates those idiosyncracies [of this case], but chooses to overlook the elephant in the room: the fact that this case arises against a backdrop of Supreme Court jurisprudence, recently revisited in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), that must guide our decision." App.46. The dissenters continued "[t]he majority's eagerness to justify departing from precedent frees it to strike out on its own, fashioning a rule that flies in the teeth of the Supreme Court's stalwart opposition to the use of inflexible, race-determinative methods in granting or denying benefits to citizens." *Id.*

C. The First Circuit approved racial diversity as a compelling interest despite its previous rejection by this Court.

1. Racial diversity is not the same as viewpoint diversity.

a. *"True educational diversity" is based on improving academic discourse by ensuring a diversity of views, and is not based on racial balancing.* Despite conclusions to the contrary by the *En Banc* Panel, the governmental interest at issue in *Grutter* is not the same or a related interest to the one offered by Lynn. *Compare, Grutter*, 539 U.S. at 308 ("Enrolling a 'critical mass' of minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional") with App.25 ("Unlike the *Gratz* and *Grutter* policies, the Lynn Plan is designed to achieve racial diversity rather than viewpoint diversity. The only relevant criterion, then, is a student's race"). The justification for racial diversity as a compelling interest cannot be found in *Grutter*. The interst in multifaceted "true education diversity" accepted as compelling in *Grutter* is rooted in the First rather than the Fourteenth Amendment. *Grutter*, 539 U.S. at 329 ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition"), *citing Regents of University of California* v. *Bakke*, 438 U.S. 265, 312 (1978). True educational diversity is an interest in academic discourse between students who contribute diverse experiences and viewpoints, not one of racial balancing.[3]

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[3] Although the interest adopted as compelling by the First Circuit is not the viewpoint diversity addressed in *Gratz* and *Grutter*, given the different roles played by public K-12 educational institutions that of colleges and universities, the underlying principle of ensuring free academic discourse among mature college-aged students based on their varied life experiences is not found among young children with

b. *Measuring diversity by race does not advance the interest in the "expansive freedoms of speech and thought."* Defining diversity by race is destructive of the benefits of viewpoint diversity and academic discourse sought through true educational diversity.

> It is not an interest in simple ethnic diversity . . . diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.

Bakke, 438 U.S. at 315 (Powell, J.) (emphasis in original).

Attempting to utilize racial diversity as a tool to advance "the robust exchange of ideas" assumes that all blacks think alike, or worse, in this case it assumes that all "minorities" think alike or will all contribute to a classroom in the same way. *See Shaw* v. *Reno*, 509 U.S. 630, 15 (1993) ("the perception that members of the same racial group - regardless of their age, education, economic status, or the community in which they live - think alike, share the same political interests, and will prefer the same candidates at the polls [amounts to impermissible racial stereotypes]"), *citing, Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury") and *Holland* v. *Illinois*, 493 U.S. 474, 484, n.2 (1990). The *Shaw* Court went on to note that

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limited life experiences in the K-12 setting. Therefore, the educational diversity interest rooted in the First Amendment as adopted in *Grutter* should not justify the denial of public K-12 assignments based on skin color. *Grutter*, 539 U.S. at 329 (noting universities' special First Amendment niche). *See also*, *PIICS*, 377 F.3d at 981-82.

policies, which perpetuate such stereotypes, run the risk of exasperating the racial divisions within our society. *Shaw* v. *Reno*, 509 U.S. at 16.

Put simply, defining diversity by race relies on stereotypes. It assumes based on the broad and ill-defined classifications of "minority" and "non-minority" that a child will contribute in a certain way, without any examination of the individual child. For example, a recent Cambodian immigrant, who would be classified simply as a "minority," would be denied an assignment to a school that is populated predominately by native-born minority students, regardless of the individual contribution the recent immigrant could bring to "disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial society." App.19.

2. Racial balancing reinforces stereotypes, rather than disarming them.

The Lynn Plan inflicts the same harm always inflicted by government when it distinguishes between its citizens based on nothing more than the color of their skin. Even though this country just celebrated the 50th anniversary of *Brown* v. *Brd. of Educ.*, if Linda Brown were a child living in Lynn today, she could still be turned away at the schoolhouse door for being black.

The dissenters noted the harm caused by the Plan:

> [T]he Lynn Plan inflicts [stigmatic harm] upon a number of students seeking to benefit from a program that Lynn knows is appealing without regard to racial reasons. To illustrate, consider that the Plan can succeed only if the opportunity to transfer to a distant school is attractive to parents. It is conceivable that some parents would transfer a child out of a desire to have the child learn in a more integrated environment. But the Lynn Plan actively creates and exploits other methods of benign coercion in search of its

> goal. For instance, Lynn admits that a major function of its 'theme' schools is to entice parents to transfer their children. Another method is selling convenience to parents. School officials are aware that some of schools are located near after-school programs or near high-employment areas. Every student, of every race, in every school zone, has some potential benefit – yet the school committee's policy evaluates whether students may take part in the transfer program based solely on the color of a student's skin.

En Banc Opinion, App.48-49 (Selya, J., dissenting).

As this Court has previously noted, "the simple act of granting benefits based on a quota or other mechanical use of race will breed cross-racial tension." *Richmond* v. *J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality op.). Recently this Court again recognized the harm caused when government uses race to distinguish between individuals. "[R]acial classifications 'threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility' . . . By perpetuating the notion that race matters most, racial segregation of inmates 'may exacerbate the very patterns of [violence that it is] said to counteract.'" *Johnson* v. *California*, 545 U.S. __, 125 S.Ct. 1141, 1147, 160 L.Ed.2d 949, 955 (2005) (emphasis in original).

The First Circuit suggests that Lynn's racial restrictions may prevent racial hostility. But, as noted by this Court, racial stereotypes usually underlie the belief that racial hostility can be cured through using racial classifications. *See Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns"); *Watson* v. *Memphis*, 373 U.S. 526, 536 (1963) ("neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials").

Unlike the First Circuit, the Fourth Circuit found that plans like Lynn's do inflict harm on the children who are denied assignments. "We find it ironic that a Policy that seeks to teach young children to view people as individuals rather than members of certain racial and ethnic groups classifies those same children as members of certain racial and ethnic groups." *Tuttle*, 195 F.3d at 707. The Ninth Circuit has recently agreed that race based school admissions policies reinforce racial stereotypes. *Kamehameha Schools*, 416 F.3d at 1042.

As noted by the dissenting judges below:

> In one sense, then, this plan is even more harmful than the racially inflexible program struck down in *Gratz*. There, prospective non-minority students could be admitted by the terms of the policy itself and thus those who were rejected could look to something other than race as a reason for their failure.

App.49 (Selya, J., dissenting). Under the Lynn Plan, race is the sole determinative factor. App.7-8. When a child sees a neighbor being admitted to a school to which they are denied access, there is no doubt that race is the reason. Or, as occurred with one pair of sisters of biracial parents in this case, when one sister (who was listed in school records as white) was permitted a transfer, but the other sister (who was listed as black) was not; there could be no doubt in the mind of these two girls that race makes all the difference as to how they will be treated.

As a result of this incident with former Plaintiffs Keana and Kearra, Lynn amended the Plan to permit parents of biracial children to switch their racial designation, making those children eligible to attend any school. This is why the First Circuit found, "[a]ny student who qualifies as 'multi-racial' is not subject to the race-conscious transfer limits." App.8, n.4. This change only emphasizes the Plan's arbitrary nature. Children classified as "non-minority" have one set of schools available to them. Children classified as "minority" have

a separate set of schools to choose from. While children who happen to have biracial parents are exempt from the racial barriers and can choose any school.

This use of *de jure* discrimination against school children as a means of addressing naturally occurring (*de facto*) housing patterns does as much to stigmatize children as any other discriminatory policy used by government. It teaches the lesson that race matters more than any other individual characteristic and that traits can be attributed to an individual based on nothing more than the color of that person's skin.

3. The interest adopted by the First Circuit is, in reality, one of addressing societal discrimination and providing role models – interests this Court has previously rejected.

Lynn argues that its Plan is necessary to "disarm racial stereotypes." App.19. Lynn's own experts testified that the sterotyping the Plan purports to cure is a "normal process" in childhood development. *Trial Transcript*, Day 10, 29:14–24. This Court has specifically rejected efforts to cure societal discrimination as a justification for racial classifications. "[A]n effort to alleviate the effects of societal discrimination is not a compelling interest" *Shaw* v. *Hunt*, 517 U.S. 899, 910 (1996). *See also, Croson*, 488 U.S. at 497 (Societal discrimination and providing role models are not compelling governmental interests).

Essentially, the First Circuit has held that children need a certain number of other children from their own race (here defined simply as minorities and non-minorities) in order to effectively learn. The argument that children need a critical mass of other children from the same racial classification strikes too closely to the role model justification rejected in *Wygant* v. *Jackson Bd. of Education*, 476 U.S. 267, 274-76 (1986) (the supposed

benefits to minority students of having minority teachers cannot justify the use of a racial classification).

4. Racial balancing does not improve quality of education and should not be considered a compelling governmental interest.

a. *The findings by Lynn's own experts belie the contention that racial balancing is the cause of improvements within Lynn's schools.* Lynn's experts found that all of Lynn's schools were doing an equal job of socializing and educating their students.

> I think what's important is that in looking at these different schools I looked to see what the environment was like. And it was uniformly positive, which was what was very impressive about it. So, it wasn't the case that one school really stood out as being, you know, seriously troubled, tough, problematic.

Trial Transcript, Day 8, 121:25 – 122:16; App. 142.

This finding by Lynn's own experts demonstrates that the level of racial diversity at Lynn's schools (ranging from 25% to 84% minority at time of trial) has no impact on the quality of socialization or education provided. We must look to other race neutral factors within the Lynn Plan, as well as at statewide educational reforms and changes in society at large, for the source of the improvements that occurred equally at Lynn's predominantly minority ("racially isolated") schools, at its predominately non-minority ("racially imbalanced") schools and at its racially balanced schools.

b. *Theories, not findings.* Although Lynn's experts found that Lynn's schools with higher levels of racial diversity were ***not*** superior to its schools with lower levels of racial diversity, they went on to discuss "theories" put forward by some authors, who hypothesize that as schools become more racially diverse they become better schools. But, the findings of Lynn's own experts were that these "theories" have not proven true in Lynn.

Instead, Lynn's experts found that Lynn's schools are "uniformly positive" in quality, regardless of their racial composition. App.142.

If the "theory" on which the *En Banc* Panel relied had any validity, Lynn's schools that were more racially diverse (*i.e.* Fallon at 48% or Callahan at 56% minority) would be superior to schools like Lynn Woods at 25%, Sisson at 27% or Harrington at 84% minority respectively. But instead, Lynn's own experts found that all of these schools are doing an equal job. App.142.

The *En Banc* Panel relied on a mere "theory" discussed by Lynn's experts, rather than those experts' findings that Lynn's more racially diverse schools are not doing a better job of educating and socializing Lynn's students in concluding that racial balancing is a compelling interest. App.19.

c. *Lynn's schools will be diverse without the Plan's racial restrictions*. In a school system with a student population that is 58% "minority," virtually any assignment plan would result in schools that are far more ethnically diverse than the majority of school schools across America. Lynn seeks to shift the already diverse population of its schools in order to meet a specific numerical goal – racial proportionality.

To the extent that the First Circuit found that specific percentages are required, this decision conflicts with the findings of Lynn's own experts and with recent decisions of the Fifth and Ninth Circuits. "[D]efining critical mass in terms of specific percentages 'would amount to outright racial balancing, which is patently unconstitutional.'" *Smith*, 392 F.3d at 379. "[A] quota system 'cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing, and '[r]acial balance is not to be achieved for its own sake.' *Cavalier*, 403 F.3d at 260, *quoting Croson*, 488 U.S. at 508 and *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992).

D. The Lynn Plan is not narrowly tailored.

In addition to the failure to establish a compelling interest justifying Lynn's discrimination on the basis of race, the Lynn Plan also lacks any of the indicia of narrow tailoring.

1. The Lynn Plan uses a non-remedial quota.

a. *Lynn's use of race is not remedial*. As the *En Banc* Panel acknowledged, "[t]his is not a case where the racial classification is aimed at remedying past segregation." App. 18. The parties stipulated that, "the education provided to Lynn's regular education students in each of the elementary, middle, and high schools in Lynn is comparable in quality, resources, and curriculum, even though schools do offer and provide varying academic programs."

b. *The racial restrictions of the Plan constitute a quota*. This Court recently defined what constitutes a quota: "To be narrowly tailored, a race-conscious admissions program cannot use a quota system --it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'" *Grutter*, 539 U.S. at 334, *quoting Bakke*, 438 U.S. at 315 (opinion of Powell, J.).

Under the Lynn Plan, children are denied transfers for one reason only – their race. App.8. At each of Lynn's schools, children are insulated from competition with other transfer applicants who belong to the disfavored race for that school. App.7-8. This is done to achieve proportional representation with the system's racial makeup, defined as +/- 10 or 15% of the system's minority student population. App. 7. The Lynn Plan is not merely race preferential; it bars members of the race disfavored for a particular school from seeking an assignment to that school.

This Court recent rejected the use of quotas in non-remedial settings. *Grutter*, 539 U.S. at 334. Despite this, the First Circuit found the use of non-remedial quotas to

be an acceptable means of preserving a "critical mass" of minority and non-minority students. *Contra McFarland*, 330 F.Supp.2d at 862 (rejecting assignment plan that place children on separate assignment lists).[4]

c. *This Court has limited racial balancing to the remedial context, yet the First Circuit has permitted its non-remedial use*. This Court has held that Courts exercising their remedial power to make whole an injured party may impose remedies that would be unconstitutional if adopted voluntarily in a non-remedial setting. *See e.g., National Soc'y of Professional Eng'r, Inc.* v. *United States*, 435 U.S. 679 (1978) (court may impose remedy that would otherwise violate First Amendment freedom of speech if imposed under other circumstances). Given this broad remedial power, this Court has permitted the limited use of racial balancing as a remedial tool. But even when utilized in this remedial role, the Court has shown disfavor for racial balancing. In *Pasadena Bd. of Educ.* v. *Spangler*, this Court held that it would be beyond the remedial authority of the district court to require the annual readjustment of school attendance zones to counteract changes in the racial makeup of the schools. 427 U.S. 424, 433-34 (1976) ("'it must be recognized that there are limits' beyond which a court may not go in seeking to dismantle a dual school

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[4] While the Sixth Circuit permitted the use of race in one of Louisville's assignment plans, the Lynn plan is more similar to the assignment plan rejected by the Sixth Circuit in *McFarland* – the "tradition school assignment process." The characteristics that distinguished the plan held unconstitutional from the plan upheld by the Sixth Circuit is that in the "traditional school" plan, race predominates over all other factors. In the "2001 plan," upheld by the Sixth Circuit, race is described as merely a "tipping" factor. In Lynn, race is the only consideration. App.8. There is no competition for seats, no random ranking by lottery, and residence is not a factor in transfer requests. These factors were key in the decision to uphold the "2001 plan" but not the "traditional school" plan. 330 F.Supp.2d at 862-63 ("in the 2001 Plan, the racial guidelines play a muted role in the assignment process along with other factors, such as residence, program capacity and, sometimes, placement in a lottery").

system"). Again, in *Freeman*, this Court held that courts are prohibited by the Equal Protection Clause from adopting limitless racial balancing. 503 U.S. at 494.

Racial balancing is only permitted for use in remedying lingering effects of discrimination. Once those lingering effects have been cured, the racial balancing must stop. The First Circuit permits this use of perpetual racial balancing for a non-remedial purpose. *Contra*, *Cavalier*, 403 F.3d at 260 (rejected perpetual racial balancing, even when cast as a remedial policy).

2. Lynn's appeal process demonstrates that the Plan also constitutes a dual assignment process.

The undergraduate program struck down in *Gratz* contained exceptions that the university argued were evidence of flexibility. This Court disagreed. *Gratz*, 539 U.S. at 274 ("We think that the flagging program only emphasizes the flaws of the University's system as a whole"). This Court explained that while it was possible for a non-minority student to be admitted based on the exceptions contained in the undergraduate admissions plan, the need for students to undergo such a process, while competing for seats with students of other races who did not, is proof of the discriminatory effect. "[T]his individualized review is only provided *after* admissions counselors automatically distribute the University's version of a 'plus' that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant." *Id.*

The Lynn Plan similarly offers exceptions. Parents can petition the Superintendent for a hardship exception. Children who are judged by Lynn to be the "right" race for that a particular school, do not need to go through this process. *See*, App.50 (Selya, J., Dissenting). The appeal process subjects children of the disfavored race to a separate assignment process – the hallmark of an illegal dual assignment system. In a perverse twist on the

accepted principles of Equal Protection jurisprudence, under the Lynn Plan, assignment requests can be denied because the parent fails to present a compelling need for race not to be a deciding factor.

3. The Lynn Plan is mechanically-applied and lacks individualized consideration.

Even where a compelling interest justifying the use of a racial classification is established, the permissible reach of such classifications is extremely limited. This Court observed in *Grutter* that "the hallmarks of a narrowly tailored plan [is that there be] truly individualized consideration [in which race is only] used in a flexible, nonmechanical way." *Grutter*, 539 U.S. at 334. The First Circuit declined to apply these hallmarks of a narrow tailoring. App.25 ("Unlike the *Gratz* and *Grutter* policies, the Lynn Plan is designed to achieve racial diversity rather than viewpoint diversity. The only relevant criterion, then, is a student's race").

Unlike the three judges that made up the majority of the *En Banc* Panel, the three judges of the original Panel applied the narrow tailoring standard as articulated by this Court:

> The Lynn Plan explicitly hinges the availability of a transfer on a student's race. There is no individualized consideration of a student's qualifications, no head-to-head comparison of one student to another, and no weight given to a student's other potential contributions to diversity . . . the Lynn Plan is even more mechanical and even less flexible than the collegiate admissions policy that the *Gratz* Court found wanting.

Panel Opinion, App.78 (internal citation and footnote omitted). *See also*, *Grutter*, 539 U.S. at 337 ("The importance of this individualized consideration in the context of a race-conscious admissions program is paramount"); *Bakke*, 438 U.S. at n.52 ("The denial to

respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program" (Powel, J.)).[5]

4. Maintaining racial diversity is not a narrowly tailored means of disarming racial stereotypes.

In their decision, the majority of the *En Banc* Panel held that this Court's admonition against the use of mechanically-applied racial classifications that lack individualized consideration was not applicable to the racial diversity objective of the Lynn Plan. App.25. But, as the *En Banc* Panel acknowledged, Lynn's ultimate objective could not be racial diversity by itself. App.18-19. *See Grutter*, 539 U.S. at 329-30 ("The Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.' That would amount to outright racial balancing, which is patently unconstitutional").

Because racial diversity cannot be the goal in itself, the *En Banc* Panel stated the interests of the Plan as "disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an

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[5] The majority on the *En Banc* Panel had to reach the conclusion that individualized consideration is not required here because, as noted by the dissenters below, Lynn already has the mechanism in place for such individualized consideration but has chosen not to use it,

> Lynn hardly can be heard to complain that such [individualized consideration] is unworkable. By its own admission, it already allows more than half of the students denied transfers under its race-based policy to have an exemption for non-race-related reasons. These transfers have not undermined the benefits of diversity in the school community. The city persists, however, in subjecting all the students who request transfers to what is in effect a two-tier process – one in which the student is evaluated solely on the basis of color and a second in which a rejected student must convince the school that his or her color should not matter.

En Banc Opinion, App.50 (Selya, J., dissenting).

increasingly multi-racial society." App.19. If these objectives are the governmental interest sought by the Plan, then the appropriate question the Circuit should have answered is: Is the maintenance of some minimum level of racial diversity (*i.e.* racial balancing) a narrowly tailored means of achieving the sought after educational improvements? Or, put more precisely to the facts of this case: Is maintaining proportional representation, measured in terms of +/-10 or 15% of the system-wide minority student population, a narrowly tailored means of "disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial society"?

Had the First Circuit properly viewed racial diversity as the means offered to achieve the end, rather than the end itself, it could not have reached the conclusion that the purely racial nature of the governmental interest eliminates the need for individualized consideration. App.25 ("The concerns motivating the individualized consideration requirement in a competitive, race-preferential admissions context that focuses on diversity along a number of axes (*e.g.*, the *Gratz* and *Grutter* policies) are simply not present in a non-competitive K-12 transfer policy aimed at racial diversity"). The First Circuit's reasoning is in direct conflict with the Fourth Circuit, which properly held that maintaining racial balance is not a narrowly tailored means of achieving the educational objectives offered as the ultimate goal of the *Tuttle* Plan, the same educational objectives put forward by Lynn. *Tuttle*, 195 F.3d at 707. *See also*, *PIICS*, 377 F.3d at 696 (finding lack of sufficient narrow tailoring where assignment policy seeking racial diversity was not flexible and lacked individualized consideration).

If the objective were educational improvement rather than naked racial balancing, an individualized examination of each student's potential contribution towards achieving that educational objective would be necessary in order to ensure the Plan is applied in a

flexible manner, and to ensure that the impact of the racial barrier is limited only to children whose assignment requests would truly advance or hinder that objective. Discussing the individualized consideration requirement, the Ninth Circuit recently held, "[t]he Supreme Court concluded that [the *Grutter*] program did not unduly harm members of any racial group because it considered 'all pertinent elements of diversity' and thus 'can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants.'" *Smith*, 392 F.3d at 374. This willingness to select applicants who do not belong to the favored racial group, but who would make meaningful contributions towards the purported educational objectives is the hallmark of flexible application.[6]

The conclusion of the three judges of the *En Banc* Panel that the individualized consideration requirement of narrow tailoring is not applicable to assignment plans that have as their objective racial diversity (App.25), is in direct conflict with decision of the Fourth and Ninth Circuits. *Tuttle*, 195 F.3d at 707 (finding that the assignment plan failed narrow tailoring because, among other defects, there was no individualized consideration); *PIICS*, 377 F.3d 976 (rejecting argument that

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[6] In *Smith*, the Ninth Circuit noted one tool for ensuring a flexible application of diversity plans, which is not utilized by Lynn. Rather than relying on mere racial stereotypes to determining what contribution an applicant may make towards achieving its educational objectives, the University of Washington Law School sought statements from applicants explaining how they would improve diversity. *Smith*, 392 F.3d at 377 ("the Law School used the letter to more narrowly tailor the awarding of a plus for an applicant's race or ethnicity by seeking more information about the role that race or ethnicity played in the applicant's life, rather than simply relying on the applicant's minority status as such"). Contrast this with the Lynn Plan which makes assumptions about the impact a child will have in a classroom based on nothing more than the color of that child's skin.

individualized consideration is not applicable to K-12 racial diversity plans).

5. The Lynn Plan is not calibrated to achieve Lynn's purported interest.

The three judges of the original First Circuit Panel unanimously agreed that the lack of flexibility and lack of individualized consideration were not the only grounds for finding the Lynn Plan unconstitutional. App.81 ("Although we could end our analysis of the Lynn Plan at this point, we think it wise to point out that the Plan has other narrow-tailoring shortcomings").

> [R]acial classifications cannot be used more often than necessary to satisfy the compelling governmental interest that is at stake. The Lynn Plan cannot pass muster in this respect . . . the Lynn Plan is calibrated toward proportional representation rather than critical mass; it seeks to maintain within each school a racial mix within 10%-15% of the racial mix of the aggregate student population (depending on the level of school). Thus, because Lynn's overall non-white school-aged population is 58%, an elementary school with a 40% non-white enrollment qualifies as racially isolated even though that school contains a critical mass of both white and nonwhite students.

Panel Opinion, App.81-82 (internal citations omitted).

The Lynn Plan is a proportional representation plan, not a "critical mass" or racial diversity plan. Children are denied assignment even where those assignment requests would have no impact on critical mass. Conversely, assignment requests are granted where they could make the school less racially diverse, if those requests meet the Plan's proportional representation goal. Because the Plan was designed with only racial proportionality in mind, a middle or high school that is 50% minority/non-minority will be defined as racially isolated because it falls outside

of the +/-10% proportional representation goal. This means a minority student would be permitted to transfer into a middle school that is 50% minority/non-minority, thereby moving the school away for 50% minority/non-minority and towards the system's current 62% minority population. App.31 (using Lynn's student population ratio at the time of the *En Banc* argument). Additionally, a transfer request between two schools that are both well above the 20% "critical mass" offered by Lynn as an objective of the Plan would still be rejected even though the assignment would not cause either school to go below the 20% level. As the three judges of the original Panel noted, "the plan is designed to achieve racial balance, not critical mass." App.82, n.10. The Panel gave the following examples:

> [F]or the 2001-02 school year, two of Lynn's elementary schools — Aborn (35%) and Hood (42%) — had minority populations substantially above the 20% necessary to achieve critical mass but below the 43% necessary to qualify as racially balanced. A minority student seeking to transfer from either of these institutions to a racially balanced school normally would be turned down, even though that transfer would not deprive either the transferor or transferee school of critical mass. A white student, on the other hand, would be allowed to make the move. By contrast, Lynn allows all transfers that do not imperil racial balance, even if particular transfers are segregative. For instance, minority students may freely transfer from Lincoln-Thomson (43% minority) to Ford (71% minority), because neither the transferor nor transferee school will be deprived of racial balance (as that term is defined by Lynn).

App.83 (emphasis in original).

This lack of calibration between the function of the Lynn Plan and Lynn's stated objective means that, even

if a court could conclude that the interest sought is compelling, the Plan is not narrowly tailored to achieve it. *Grutter*, 539 U.S. at 333 ("[T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose'" (alteration in original)), *quoting Shaw* v. *Hunt*, 517 U.S. at 908.

6. Lynn failed to exhaust race-neutral alternatives.

As noted by the original Panel, Lynn has failed to exhaust race-neutral alternatives. Alternatives were not rejected based on whether or not they would be effective at disarming stereotypes, they were rejected because they would not maintain racial balance. *Panel Opinion*, App.84 (noting that the reason the available race-neutral alternatives were rejected was because they are not geared towards racial balancing). Lynn's reasoning in rejecting these alternatives demonstrates that the Plan has more to do with creating chromatically correct classrooms in order to qualify for state funding than advancing the purported educational objectives.

In addition to the limited alternatives considered by Lynn, the U.S. Department of Education has prepared a study listing several effective race-neutral alternatives available in the K-12 setting. ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION, U.S. Dept. of Ed., February, 2004, http://www.ed.gov/about/offices/list/ocr/raceneutral.html. The Panel also noted the success of Boston in maintaining racial diversity through its new race-neutral assignment process. App.85, *citing*, *Anderson* v. *City of Boston*, 375 F.3d 71 (1st Cir. 2004).

7. Lynn's Plan is unlimited in its duration.

Unlike the three judge majority of the *En Banc* Panel, the three judges of the original Panel correctly applied the requirement that the use of racial classifications must be limited in duration. App.86 ("the Committee has [not]

committed to undertake any manner of periodic review to determine whether ongoing developments might render the use of racial restrictions superfluous").

Because the Plan does not include a process for regular review to determine when its racial restrictions are no longer needed in order for it to achieve the purported educational objectives, what the First Circuit has approved is the perpetual racial balancing of public schools. Under this decision, public schools systems have a free hand to maintain racial balance through mechanically-applied inflexible racial barriers that are limitless in their duration. The intervention of this Court is required to address the applicability of this and the other requirements of narrow tailoring so that this decision does not usher in a new era of young children being turned away at the schoolhouse door because of the color of their skin.

CONCLUSION

For each of these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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(2)

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

SAMANTHA J. COMFORT, ON BEHALF OF HER MINOR CHILD, ELIZABETH NEUMYER, ET AL.,

Petitioners,

v.

THE LYNN SCHOOL COMMITTEE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 03-2415

SAMANTHA J. COMFORT, ETC., ET AL.,
Plaintiffs, Appellants,

v.

LYNN SCHOOL COMMITTEE ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nancy Gertner, U.S. District Judge]

Before

Boudin, Chief Judge,
Torruella, Selya, Lipez, and Howard, Circuit Judges.

Michael Williams, with whom Robert J. Roughsedge, Chester Darling, and Citizens for the Preservation of Constitutional Rights were on brief, for plaintiffs.

Sharon L. Browne on brief for Pacific Legal Foundation, amicus curiae.

Richard W. Cole, Assistant Attorney General, with whom Thomas F. Reilly, Attorney General, and John R. Hitt, Assistant Attorney General, were on brief, for state defendants.

James P. Lamanna, Assistant City Solicitor, and John C. Mihos on consolidated brief for municipal defendants.

Edward J. Barshak and Sugarman, Rogers, Barshak & Cohen, P.C. on brief for Asian-American Lawyers Association of Massachusetts, Boston Bar Association, Community Change, Inc., Fair Housing Center of Greater Boston, Jewish Alliance for Law and Social Action, New England Area Conference of the NAACP, and Greater Boston Civil Rights Coalition, amici curiae.

Patricia A. Brannan, Maree Sneed, and Hogan & Hartson, LLP on brief for Council of the Great City Schools, American Association of School Administrators, National Association of Secondary School Principals, National Education Association, National School Boards Association and Public Education Network, amici curiae.

Nathalie F.P. Gilfoyle, General Counsel, Lindsay Childress-Beatty, Deputy General Counsel, David W. Ogden, and Wilmer, Cutler, Pickering, Hale and Dorr, LLP on brief for American Psychological Association, amicus curiae.

Theodore M. Shaw, Director-Counsel, Norman J. Chachkin, and Chin Quang Le on brief for Northshore Branch of the NAACP, NAACP Legal Defense & Educ. Fund, Inc., Lawyers' Comm. for Civil Right of the Boston Bar Association, and various individuals, amici curiae.

Donna Brewer MacKenna and Casner & Edwards, LLP on brief for Lynn Business Education Foundation and Lynn Business Partnership, Inc., amici curiae.

Thomas Miller, Attorney General (Iowa), Eliot Spitzer, Attorney General (New York), Caitlin J. Halligan, Solicitor General (New York), Michelle Aronowitz, Deputy Solicitor General (New York), Natalie R. Williams, Deputy Bureau Chief, and Hilary B. Klein, Assistant Attorney General (New York), G. Steven Rowe, Attorney General (Maine), and Mark L. Shurtleff,

Attorney General (Utah), on brief for States of Iowa, New York, Maine, and Utah, amici curiae.

Thomas J. Henderson, Derek Black, Harris J. Yale, Bernadette McCann Ezring, Samantha G. Fisherman, Virginia Johnson, and Weil, Gotshal & Manges, LLP on brief for Lawyers' Comm. for Civil Rights Under Law, amicus curiae.

David B. Broughel and Day, Berry & Howard, LLP on brief for Mass. Coalition for Equitable Educ., Mass. Teachers Ass'n, Mass. Fed'n of Teachers, Mass. Ass'n of Sch. Superintendents, Metro Council for Educ. Opportunity, Inc., Center for Law and Educ., Citizens for Pub. Sch., Mass. Ass'n of Hispanic Attorneys, League of Women Voters of Mass., Mass. Law Reform Inst., Alliance for High Standards NOT High Stakes, Schott Center for Public and Early Educ., Nat'l Center for Fair & Open Testing, and Progressive Jewish Alliance, amici curiae.

Angelo N. Ancheta on brief for Civil Rights Project at Harvard Univ., amicus curiae.

June 16, 2005

Opinion En Banc

LIPEZ, Circuit Judge. This appeal requires us to review certain features of a voluntary plan designed to achieve the educational benefits of racial diversity in the public schools of Lynn, Massachusetts ("Lynn Plan" or "Plan"). The Plan addresses resource allocation, curricula, and other aspects of the classroom experience. Relevant to this appeal, it also controls school assignments and transfers. Under the Plan, each student is entitled to attend his or her neighborhood school. Students who do not wish to attend their neighborhood school may apply to transfer to another school. Approval of a transfer

depends, in large part, on the requesting student's race and the racial makeup of the transferor and transferee schools.

Parents whose children were denied transfers on race-conscious grounds challenged the transfer provisions of the Lynn Plan, claiming, inter alia, that the provisions violate the Fourteenth Amendment Equal Protection Clause. The district court rejected the parents' challenges and upheld the Plan. A panel of this court reversed, finding that the Plan was not narrowly tailored to the defendants' compelling interest in achieving the benefits of educational diversity. We granted review en banc and now affirm.

Our review of the equal protection challenge is informed by the Supreme Court's recent decisions regarding affirmative action in higher education, Grutter v. Bollinger, 539 U.S. 306 (2003), and Gratz v. Bollinger, 539 U.S. 244 (2003). We conclude, based on those cases, that Lynn has a compelling interest in securing the educational benefits of racial diversity. Applying the analytic framework set forth in Grutter and Gratz to the context of a K-12, non-competitive transfer plan, we hold that the Lynn Plan is narrowly tailored to meet this compelling interest.

The plaintiffs assert a number of other claims as well. We do not reach the merits of their facial challenge to the Massachusetts Racial Imbalance Act, which fails for lack of standing. We treat the plaintiffs' federal statutory claims as foreclosed by our equal protection ruling and reject their challenge to the Plan under Article 111 of the Massachusetts Declaration of Rights. Finally, we conclude that the district court properly denied the plaintiffs' motion for recusal.

I. Background

This case comes to us with a rich factual background, described in detail in a series of district court rulings. See Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328 (D. Mass. 2003) (Comfort IV); Comfort v. Lynn Sch. Comm., 150 F. Supp. 2d 285 (D. Mass. 2001) (Comfort III);

Comfort v. Lynn Sch. Comm., 131 F. Supp. 2d 253 (D. Mass. 2001) (Comfort II); Comfort v. Lynn Sch. Comm., 100 F. Supp. 2d 57 (D. Mass. 2000) (Comfort I). We set forth only those facts necessary to put this case into context, drawing upon the largely unchallenged findings of the district court.

A. Lynn Public Schools

Lynn is the ninth-largest city in Massachusetts, with a population of approximately 89,000. At all relevant times, its school system has been neighborhood-centered, entitling students to attend their local schools as a matter of right. By the mid-1970s, several of Lynn's schools were experiencing significant racial imbalance. In 1977, for example, the Washington Community Elementary School had a nonwhite student population of 57%, more than six times the nonwhite percentage in the school system as a whole. Predominantly nonwhite schools suffered disproportionately from resource shortages, overcrowding, discipline problems, and teacher apathy. The school system was plagued by high absentee rates, racial tension, and low test scores.

In an effort to combat these problems, Lynn established its first magnet school in 1979. At the same time, it inaugurated a voluntary transfer program aimed at attracting white students to that school (which apparently was located in a predominantly nonwhite area of the city). The magnet school was only modestly successful in alleviating racial imbalance.

In the meantime, Lynn was undergoing a demographic shift. Between 1980 and 2000, the city went from being 93% white to 63% white, with the school-age population becoming more than half nonwhite by 2000. Residential segregation by race increased during this period as whites clustered in the northern and western areas of Lynn and nonwhites concentrated in its south-central region.

Because of the neighborhood school system, these residential patterns heightened the racial imbalance of

Lynn's schools. By 1987, seven of eighteen elementary schools had white enrollments of 90% or more, while four others had predominantly nonwhite student bodies. Lynn responded by developing a plan to launch ten magnet schools,[1] but city leaders did not believe that the magnet program, on its own, would effectively combat the growing racial imbalance. In September 1989, the Lynn School Committee ("Lynn") adopted the Plan that is the subject of this litigation.[2]

B. The Lynn Plan

The defendants describe the Lynn Plan as a voluntary plan for school improvement and the elimination of minority isolation. The Plan begins with the premise that every child is entitled to attend his or her neighborhood school. Race is taken into account only when a student seeks to transfer to a school other than his or her neighborhood school.

Lynn operates eighteen elementary schools (six of which are magnets), four middle schools (three of which have magnet programs), and three high schools.[3] In the 2001-02 school year, 15,444 students were enrolled in the Lynn public schools. Out of this group, approximately 42% of students were white, 15% African-American, 29% Hispanic, and 14% Asian (for a total "minority" or nonwhite population of roughly 58%).

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[1]Ordinarily, the label "magnet school" describes an elite public school with a competitive admissions policy. Lynn's magnet schools, however, do not use a competitive admissions policy. Rather, Lynn uses the term for schools that feature an educational theme beyond the standard curriculum, designed partially to attract cross-neighborhood transfers. Examples of such themes include "Life Science" and "Reading and Writing Literary and Whole Language." Despite this specialization the parties have stipulated that "the education provided . . . in each of the elementary, middle, and high schools in Lynn is comparable in quality, resources[,] and curriculum."

[2]The Plan was amended in 1990 and again in 1999.

[3]Lynn also operates six alternative schools, offering such things as special needs education and vocational training. These schools are not subject to the transfer provisions of the Lynn Plan.

For purposes of the Lynn Plan, schools are placed in one of three categories. A "racially balanced" school is one in which the percentage of nonwhite students falls within a set range of the overall proportion of minorities in Lynn's student population. The range is +/- 15% for elementary schools and +/- 10% for other schools. For example, an elementary school with between 43% and 73% nonwhite students during the 2001-02 school year was considered racially balanced, as was a middle or high school that had a nonwhite enrollment of 48% to 68%. In the 2001-02 school year, nine of Lynn's elementary schools, one of its middle schools, and all three of its high schools were racially balanced.

If a school's nonwhite population falls below the racially balanced range (i.e., if the percentage of nonwhite students in 2001-02 fell below 43% for an elementary school or 48% for a middle or high school), it is "racially isolated." Conversely, a school whose nonwhite population rises above the racially balanced range (i.e., over 73% for an elementary school or 68% for a middle or high school) is considered "racially imbalanced." In 2001-02, five of Lynn's elementary schools and one of its middle schools were classified as racially isolated, while four elementary schools and two middle schools were racially imbalanced.

The transfer policy is straightforward. Space permitting, a student whose neighborhood school is racially balanced may transfer to another racially balanced school without regard to race. Because all three of Lynn's high schools are currently racially balanced, for example, students may transfer freely among them. Students are also permitted to make "desegregative" transfers. That is, a white student may transfer out of a racially isolated school and into a racially imbalanced school (i.e., to a school with a lower percentage of white students), and a nonwhite student may transfer out of a racially imbalanced school and into a racially isolated school (i.e., to a school with a lower percentage of nonwhite students). By contrast, absent certain

exceptions, students may not make "segregative" transfers. A segregative transfer is one that would exacerbate racial imbalance in the sending or receiving school (i.e., a white student may not transfer to a racially isolated school, and a nonwhite student may not transfer to a racially imbalanced school).[4]

A student whose transfer request is denied is entitled to appeal. Roughly half of all appeals are granted. Common grounds for successful appeals are medical and safety concerns, daycare issues, and other types of hardship. Appeals will also be granted when the denial would result in siblings attending different schools. The Plan is implemented by the Parent Information Center ("PIC"), which processes all admissions and transfers, works with parents on appeals, and monitors enrollment and racial composition of individual schools and the district in general.

As the plaintiffs point out, the Lynn Plan can result in unequal treatment based on race. Consider, for example, two children, one white and one African-American, who are initially assigned to the same neighborhood elementary school for the 2001-02 school year. The school is racially isolated (i.e., less than 43% minority). Both children request a transfer to a nearby school that is racially imbalanced (i.e., greater than 73% minority). Under the Plan, the white student will be permitted to transfer, and the African-American student will not.

Although the race-conscious transfer policy is the focus of this appeal, the Lynn Plan also includes numerous other provisions aimed at improving the quality of all schools in the district. It calls for curricular programs and teacher training designed to foster cross-racial understanding and reduce racial tension. It also implemented a standardized curriculum throughout Lynn's schools; developed performance indicators for

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[4]Any student who qualifies as "multi-racial" is not subject to the race-conscious transfer limits.

schools, programs and students; took measures to improve student attendance; and created business/college partnerships with schools to improve the quality of instruction. Finally, the Plan envisions a construction program to upgrade school facilities and alleviate overcrowding.

All parties agree that Lynn's public schools have improved markedly since the Plan's inception, although they dispute which aspects of the Plan are responsible for this improvement. In any event, students' standardized test scores have increased, absentee levels have decreased, and racial tensions have diminished under the Plan.

C. The Racial Imbalance Act

The Racial Imbalance Act ("RIA"), Mass. Gen. Laws ch. 15, " 1I, 1J, 1K; id. ch. 71, " 37C, 37D, directs the Massachusetts Board of Education to remedy de facto segregation in the public schools throughout the state. See Sch. Comm. of Boston v. Bd. of Educ., 227 N.E.2d 729, 732 (Mass. 1967). The legislature enacted the RIA in response to findings that dramatic levels of racial imbalance in the public schools threatened to harm students' educational opportunities. See id. at 733-34. The RIA has two main effects: it authorizes the Board to fund voluntary efforts to improve racial balance, Mass. Gen. Laws ch. 15, §1I, and it allows the Board to require that school districts adopt integration plans in certain circumstances, id. ch. 71, §37D.

The Lynn school system has received significant state aid under the voluntary provisions of the RIA. These funds have helped pay for new construction and school renovations.[5] Lynn also receives a state stipend of $500

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[5]Before 2001, the RIA provided reimbursement for school construction and renovations undertaken for the purpose of reducing racial imbalance. The law has been amended to change this funding structure, but that amendment applies prospectively and does not affect Lynn's state funding.

for each desegregative student transfer, and the state defrays certain costs associated with cross-neighborhood transportation and the creation of magnet schools.

D. Procedural History

In 1999, the parents of children who had been denied transfers under the Lynn Plan ("Comfort plaintiffs") brought a civil action against the Lynn School Committee, its individual members, and several governmental officials. They claimed that the Lynn Plan and the RIA violate the Fourteenth Amendment Equal Protection Clause, several federal civil rights statutes, and Article 111 of the Massachusetts Declaration of Rights. The Commonwealth intervened as a party defendant for the limited purpose of defending the RIA. See 28 U.S.C. §2403(b). The district court denied a motion to preliminarily enjoin the race-conscious aspects of the Lynn Plan, see Comfort I, 100 F. Supp. 2d at 59-60, and dismissed several of the plaintiffs' claims, see Comfort III, 150 F. Supp. 2d at 289, 296-97, 302; Comfort II, 131 F. Supp. 2d at 254, 256. Only one of the original Comfort plaintiffs remains in the case. Other parents ("Bollen plaintiffs") then filed a second action that included the Comfort plaintiffs' claims, as well as other statutory claims. The Bollen plaintiffs also added as defendants the members of the Board of Education in their official capacities. The district court consolidated the two cases.

Following an eleven-day bench trial, the district court issued a lengthy opinion dismissing a number of the Bollen plaintiffs' claims on standing grounds. Comfort IV, 283 F. Supp. 2d at 361-63. It rejected the facial attack on the RIA, id. at 366-68, and determined that the Plan's transfer provisions are narrowly tailored to several compelling state interests, and thus constitutional. Id. at 375-92. The court also rejected the plaintiffs' remaining federal statutory claims, treating the statutory provisions as co-extensive with the Equal Protection Clause. Id. at 392-93. Finally, the court held that the transfer

provisions of the Lynn Plan did not violate Article 111 of the Massachusetts Declaration of Rights. Id. at 393-400.

A panel of this court reversed, holding that the Plan could not the survive strict scrutiny review required by the Equal Protection Clause. Relying on the Supreme Court's decision in Grutter upholding a race-conscious admissions policy at the University of Michigan Law School, the panel recognized a compelling interest in "obtaining the educational benefits of a racially diverse student body." Comfort v. Lynn Sch. Comm., No. 03-2415, slip op. at 30 (1st Cir. Oct. 20, 2004), withdrawn by 2004 WL 2348505 (1st Cir. Nov. 24, 2004). It concluded, however, that the Plan is not narrowly tailored to that interest because it uses race "mechanically" and "forgoes individualized consideration of transfer applications." Id. at 40. The panel also cited other narrow tailoring flaws, including the Plan's breadth and indefinite duration. We granted en banc rehearing and now affirm.[6]

II. Standing

"[T]he general rule is that a court should first confirm the existence of rudiments such as jurisdiction and standing before tackling the merits of a controverted case." Berner v. Delahanty, 129 F.3d 20, 23 (1st Cir. 1997). This is because "standing is a necessary concomitant to the court's power to adjudicate a case." R.I. Ass'n of Realtors v. Whitehouse, 199 F.3d 26, 30 (1st Cir. 1999). Thus, we begin by considering the plaintiffs' standing.

To establish standing in federal court, a party must demonstrate three things:

> First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal

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[6]We express our appreciation to the many amici curiae for their valuable assistance.

> connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and internal quotation marks omitted). The plaintiffs must have standing to obtain both forms of relief they seek: an injunction against the race-conscious aspects of the Plan and a declaration that the RIA is facially unconstitutional. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000).

With respect to the Lynn Plan, one Bollen plaintiff (Gina Leone) clearly meets the threshold standing requirement. Leone sues on behalf of her minor son, Troy Lamothe, whose transfer request was denied on the ground that it would be segregative. The fact that Troy was allowed to attend the school of his choice pending the outcome of this litigation does not defeat standing. See Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 n.3 (1st Cir. 1995) (accepting plaintiff's standing despite agreement not to enforce disputed ordinance pending outcome of litigation). So long as one plaintiff has standing to seek a particular form of global relief, the court need not address the standing of other plaintiffs seeking the same relief. See Watt v. Energy Action Educ. Found., 454 U.S. 151, 160 (1981); Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 183 (1st Cir. 1999).

Standing to seek injunctive or declaratory relief against the RIA is a different matter. The parties stipulated, and the district court confirmed, that the mandatory portion of the RIA (i.e., the provision under which the Board of Education can require a district to

adopt a plan to reduce racial imbalance) has not been applied to Lynn. Comfort IV, 283 F. Supp. 2d at 367. The plaintiffs nevertheless launch a facial attack against the RIA's mandatory provisions, Mass. Gen. Laws ch. 71, §37D, contending that they offend the Fourteenth Amendment Equal Protection Clause and Article 111 of the Massachusetts Constitution by giving white children a right to transfer out of isolated schools and nonwhite children a right to transfer out of imbalanced schools, but not vice versa (i.e., white children cannot transfer out of imbalanced schools and nonwhite children cannot transfer out of isolated schools). Even if that is true in theory, the plaintiffs cannot overcome the fact that only a person who was denied a transfer on the basis of the mandatory provisions of the RIA has standing to challenge them.

The mandatory provisions of §37D apply only to school districts that refuse to create voluntary plans to combat identified racial imbalance. See Sch. Comm. of Springfield v. Bd. of Educ., 319 N.E.2d 427, 429 (Mass. 1974). Lynn never refused to take action; rather, it drafted and implemented a voluntary plan. The plaintiffs therefore have not suffered a cognizable injury from §37D of the RIA.[7] Accordingly, they lack standing to seek a declaration as to its validity.

The plaintiffs also lack standing to seek injunctive or declaratory relief against the RIA provisions that offer incentives to districts that voluntarily adopt plans to combat racial imbalance. See Mass. Gen. Laws ch. 15, " 1I, 1J, 1K; id. ch. 71, §37C. Redressability, one of the prerequisites for standing, see N.H. Right to Life PAC v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996), requires a substantial likelihood that the relief sought will in fact remedy the alleged injury, Bonas v. Town of N. Smithfield, 265 F. 3d 69, 73 n.4 (1st Cir. 2001). Plaintiffs

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[7]Nor have the plaintiffs shown that they are under any imminent threat of being subjected to these mandates.

describe their injury as both a racially-based denial of transfers and the stigma of their inability to "compete" on equal terms for transfers. Even assuming arguendo that this asserted injury is somehow traceable to the RIA, the plaintiffs cannot show that an injunction against the RIA's incentive provisions will lead to racially unrestricted transfers within the Lynn public schools or eliminate the perceived stigmatic harm.

This point is apparent from the record. Under the terms of the RIA, Lynn has received state funding for construction and busing based on its voluntary efforts to combat racial imbalance. Even if we directed the Board to distribute aid without regard to racial balancing efforts, the plaintiffs have not demonstrated that redress would likely follow. There is no reason to believe that Lynn would cancel its transfer program merely because state funding was no longer contingent on it.

In an effort to sustain their claim, the plaintiffs and amicus Pacific Legal Foundation also present a second theory for prospective relief. They assert that the incentive provisions of the RIA are effectively mandatory because they coerce school districts to adopt race-conscious plans by tying state aid to the adoption of those plans. There is a flaw in this argument. While the RIA's incentive provisions reward schools that address racial imbalance, they do not dictate a procedure or methodology by which schools must do so. See Mass. Gen. Laws ch. 15, §1I; id. ch. 71, §37C. Given the absence of a requirement that schools adopt race-conscious plans to comply with the RIA, the plaintiffs have not shown that the incentive provisions of the RIA are causally responsible for the voluntary adoption of race-conscious transfer policies.

Even if the plaintiffs did have standing to mount a facial challenge to the voluntary provisions of the RIA, we agree with the district court that such a challenge would fail. Comfort IV, 283 F. Supp. 2d at 367-68. "A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger

must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Such circumstances exist here. As the district court recognized, "[a] school district may theoretically adopt a plan that improves racial imbalance without explicitly introducing race-based criteria at all." Comfort IV, 283 F. Supp. 2d at 367-68 & n.77 (noting that "if a small district with racially identifiable school attendance zones built a single central elementary, middle, and high school to absorb its entire enrolled student populations, this strategy would qualify as a racial balancing plan under the RIA, and it would not trigger any equal protection scrutiny"); see also Boston's Children First v. Boston Sch. Comm., 260 F. Supp. 2d 318, 327 (D. Mass. 2003) (finding that the RIA's goals may be satisfied by race-neutral methods), aff'd sub nom. Anderson v. City of Boston, 375 F.3d 71 (1st Cir. 2004).

III. Federal Equal Protection Claims

The main issue on appeal is the constitutionality of the Lynn Plan's race-conscious transfer restrictions. The plaintiffs contend that by mechanically taking race into account, the Plan violates the Equal Protection Clause of the Fourteenth Amendment and various federal civil rights statutes. The resolution of the federal statutory claims depends on the fate of the constitutional challenge. See infra Part III.D. Consequently, we focus on the equal protection issue.

A. Standard of Review

We review the court's findings of fact for clear error and its legal conclusions, including its application of the law to the facts, de novo. See Wessmann v. Gittens, 160 F.3d 790, 795 (1st Cir. 1998).

The Supreme Court has reviewed racial classifications under the strict scrutiny standard, which requires that the policy be narrowly tailored to a compelling state interest. Grutter, 539 U.S. at 326; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). The defendants

urge us to apply a more relaxed standard here. They emphasize that although the Plan is race-conscious, it is unlike affirmative action because it affects whites and nonwhites equally.

This argument is foreclosed by the Supreme Court's recent decision in Johnson v. California, 125 S. Ct. 1141 (2005). There, the Court considered an unwritten policy of the California Department of Corrections whereby inmates are segregated by race for up to sixty days after entering a new correctional facility. Rejecting the State's argument that its policy should be subjected to relaxed scrutiny because it "neither benefits nor burdens one group or individual more than any other group or individual," id. at 1147, the Court explained that all racial classifications

> raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that, "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion). We therefore apply strict scrutiny to all racial classifications to smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.

Id. at 1146 (internal quotation marks omitted). This rule applies in the present context just as firmly. The Plan must be reviewed under strict scrutiny.

This standard is not "strict in theory, but fatal in fact." Id. at 1151; see also Grutter, 539 U.S. at 326-27 ("Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it."). Strict scrutiny "is designed to provide a framework for carefully examining the importance and the sincerity of the

reasons advanced by the governmental decisionmaker for the use of race in that particular context." Grutter, 539 U.S. at 327. We therefore bear in mind the court's admonition that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." Id.

B. Compelling State Interest

Until recently, there was some question as to whether diversity could constitute a compelling interest in the educational context. See Wessmann, 160 F.3d at 795-96. The Supreme Court has now answered that question in the affirmative, holding in Grutter that a law school's interest in obtaining the educational benefits that flow from a diverse student body was compelling enough to justify the narrowly tailored use of race in admissions. 539 U.S. at 343.

Grutter involved a challenge to the University of Michigan Law School's admissions policy, which took into account racial and ethnic background as one of several "soft variables" used in assessing applicants. Id. at 315. The Law School justified this strategy as furthering its goal of assembling a class that was both "exceptionally . . . qualified and broadly diverse." Id. at 329. It also sought to enroll a "critical mass" of minority students, thereby enhancing its quest for broad diversity. Id. at 330.

The Grutter Court stressed that the Law School's plan did not pursue a critical mass of minority students for its own sake, but rather for the sake of obtaining the educational benefits that flow from having a racially diverse student body. Id. at 329-30 (acknowledging that racial balancing for its own sake is unconstitutional). These educational benefits include promoting cross-racial understanding, breaking down stereotypes, fostering livelier and better informed class discussions, and preparing students to succeed in an increasingly diverse society. Id. at 330. The Court largely deferred to the Law School's educational judgment not only in determining

that diversity would produce these benefits, but also in determining that these benefits were critical to the school's educational mission. Id. at 328-33. The Court warned, however, that "scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university." Id. at 328. Nevertheless, the Court concluded that the pursuit of these benefits constituted a compelling state interest. Id. In so ruling, it recognized "the overriding importance of [education in] preparing students for work and citizenship." Id. at 331.

Against this background, we consider the interest that Lynn's race-conscious Plan seeks to advance. This is not a case where the racial classification is aimed at remedying past segregation. See Comfort IV, 283 F. Supp. 2d at 390 n.101. Rather, the parties stipulated that Lynn's interests

> include fostering integrated public schools and what Lynn believes are [their] positive effects; reducing minority isolation and avoiding segregation and what Lynn believes are their negative effects; promoting a positive racial climate at schools and a safe and healthy school environment; fostering a cohesive and tolerant community in Lynn; promoting diversity; ensuring equal education and life opportunities and increasing the quality of education for all students.

The district court grouped these interests into two categories: (i) reaping the educational benefits that flow from having a racially diverse student body in each of Lynn's public schools, and (ii) avoiding the negative educational consequences that accompany racial isolation.

Although there are some differences between these interests, we conclude that they are essentially two sides of the same coin. The negative consequences of racial isolation that Lynn seeks to avoid and the benefits of

diversity that it hopes to achieve are rooted in the same central idea: that all students are better off in racially diverse schools. We therefore restate the interests at stake here as obtaining the educational benefits of a racially diverse student body.

Lynn maintains that ensuring a racially diverse student body in its schools has produced, and will continue to produce, many of the same benefits cited by the Grutter Court: disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial society. The defendants' expert evidence also suggests that racially isolated students often feel psychological burdens that can lead to poor attendance and academic woes, and that these effects can be combated by racial integration. Consistent with these assertions, Lynn's schools have indeed experienced many positive developments -- including higher attendance rates, declining suspension rates, a safer environment, and improved standardized test scores -- since the Plan's inception.

In Lynn's view, these developments can be explained by the intergroup contact theory. This theory holds that "under certain conditions, interaction between students of different races promotes empathy, understanding, positive racial attitudes[,] and the disarming of stereotypes." Comfort IV, 283 F. Supp. 2d at 356. Under the intergroup contact theory, there are four basic conditions for success: (1) equal status among racial groups, (2) the presence of teachers and staff trained to facilitate interactions between members of different groups, (3) common goals and cooperative activities, and (4) opportunities for personalized contact with a sufficient number of children from different racial groups to disrupt stereotypes. Id. at 356-57.

Lynn's experts explained that meaningful intergroup contact (the fourth condition of intergroup contact theory) requires that a school have a "critical mass" of students of each group, i.e., white and nonwhite. Id. at 357. Lynn's experts also testified, and the district court found, that

the benefits of intergroup contact continue to accrue as a school becomes increasingly diverse. Id. Citing this theory and crediting the defense experts who explained its application in Lynn, the district court agreed that there was a causal link between improvements in the school system and increased racial diversity. Id. at 353-54.

While acknowledging improvements in the Lynn schools since the Plan's inception, the plaintiffs disagree that these changes can be attributed to the race-conscious aspect of the Lynn Plan. More significantly, they also contend that regardless of whether there are educational benefits to racial diversity, Lynn does not have a compelling interest in achieving those benefits. We disagree.

Lynn's transfer policy expressly aims at attaining racial diversity in the city's schools. Where a community does not seek racial diversity for its own sake, but rather to advance a compelling interest in the educational benefits that diversity provides, there is no absolute bar to pursuing racial diversity. See Grutter, 539 U.S. at 330. The district court found that this was Lynn's purpose, Comfort IV, 283 F. Supp. 2d at 375-76, and the record supports that finding. We see no reason to second-guess it. Cf. Grutter, 539 U.S. at 328 (stating that, typically, a school's "educational judgment that . . . diversity is essential to its educational mission is one to which we defer").

The plaintiffs assert that, unlike Grutter, this case does not implicate a compelling interest that would justify the pursuit of racial diversity. The admissions plan at issue in Grutter strove for diversity along many axes, including race, in an effort to create a student body with diverse viewpoints, thereby enriching classroom discussion and academic experiences. See 539 U.S. at 329 ("As part of its goal of assembling a class that is . . . broadly diverse, the Law School seeks to enroll a critical mass of minority students." (internal quotation marks omitted)). The plaintiffs contend that Grutter's recognition of a compelling interest in "the educational

benefits that flow from student body diversity," 539 U.S. at 330, is thus limited to the benefits that flow from viewpoint diversity in the higher education context and does not extend to the benefits that flow from racial diversity in the K-12 context.

Again, we disagree. Lynn's asserted interests bear a strong familial resemblance to those that the Grutter Court found compelling. There is no reason to believe that these interests are advanced by viewpoint diversity but not racial diversity, or that they are substantially stronger in the context of higher education than in the context of elementary and secondary education. See McFarland v. Jefferson Cty. Pub. Schs., 330 F. Supp. 2d 834, 852-53 (W.D. Ky. 2004) (reasoning that the benefits recognized in Grutter also "accrue to students in racially integrated public schools"); cf. Plyler v. Doe, 457 U.S. 202, 221 (1982) (emphasizing the importance of K-12 education "in maintaining the fabric of our society"). In fact, there is significant evidence in the record that the benefits of a racially diverse school are more compelling at younger ages. See, e.g., Comfort IV, 283 F. Supp. 2d at 356 (summarizing expert's testimony that "[i]t is more difficult to teach racial tolerance to college-age students; the time to do it is when the students are still young, before they are locked into racialized thinking").

The plaintiffs correctly point out that the benefits attributed to the Lynn Plan are not identical to those described in Grutter. But Grutter teaches that the compelling state interest in diversity should be judged in relation to the educational benefits that it seeks to produce. 539 U.S. at 330. The Lynn Plan uses race in pursuit of many of the same benefits that were cited approvingly by the Grutter Court, including breaking down racial barriers, promoting cross-racial understanding, and preparing students for a world in

which "race unfortunately still matters." Id. at 333.[8] There are, of course, some variances between the benefits sought. For example, the law school plan at issue in Grutter focused on the advantages of viewpoint diversity in the classroom, while Lynn emphasizes the positive impact of racial diversity on student safety and attendance. But it is natural that safety and attendance issues will loom larger in elementary and secondary schools than in graduate schools. Conversely, lively classroom discussion is a more central form of learning in law schools (which prefer the Socratic method) than in a K-12 setting. These differences do not negate a compelling interest in racial diversity in a K-12 setting. Instead, they are the logical result of context.

We are persuaded by the extensive expert testimony in the record, rooted in observations specific to Lynn, that there are significant educational benefits to be derived from a racially diverse student body in the K-12 context. Lynn has a compelling interest in obtaining those benefits. See Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 752 (2d Cir. 2000); McFarland, 330 F. Supp. 2d at 855.

C. Narrow Tailoring

Recognizing that public schools have a compelling interest in obtaining the educational benefits of racial diversity does not give schools a blank check to adopt race-conscious policies. Rather, the government's use of race must be narrowly tailored to achieve its compelling interest. See Grutter, 539 U.S. at 333. "The purpose of the narrow tailoring requirement is to ensure that 'the means chosen 'fit' . . . th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" Id. (quoting Richmond, 488 U.S. at 493).

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[8]Notably, one of the studies that the Supreme Court cited as demonstrating that diversity produces educational benefits was authored by the defendants' expert in this case, Dr. Gary Orfield.

Narrow tailoring generally requires the proponent to show that a plan or practice is (i) necessary to the declared purpose, (ii) proportional to the declared purpose, and (iii) not more burdensome than necessary on third parties. See United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality opinion). It is a context-specific inquiry that must be "calibrated to fit the distinct issues raised" in a given case, taking "relevant differences into account." Grutter, 539 U.S. at 334 (internal quotation marks omitted).

Although the Supreme Court has not yet considered a constitutional challenge to a voluntary race-based transfer policy for elementary and secondary schools, its recent opinions in Grutter and Gratz provide some guidance for our narrow tailoring inquiry into the use of race to obtain the educational benefits of diversity. Thus we consider these cases further.

1. Gratz and Grutter

Gratz involved a challenge to the University of Michigan's undergraduate admissions program. The University automatically assigned twenty points -- one-fifth of the 100 points necessary to guarantee admission -- to an applicant from an underrepresented racial or ethnic minority group. Gratz, 539 U.S. at 255. This twenty-point bonus effectively made race/ethnicity determinative for minimally qualified minority applicants. Id. at 272. Grutter involved a challenge to the University of Michigan Law School's admissions policy. The Law School took race into account as one of several variables in an individual's application. Grutter, 539 U.S. at 340. It assigned no mechanical score based on an applicant's race; instead, it considered race only as one of several possible ways in which an applicant could enrich the diversity of the student body. Id. at 315-16.

The Supreme Court struck down the undergraduate admissions plan in Gratz while upholding the law school admissions policy in Grutter. In arriving at these decisions, the Court followed a four-part narrow tailoring

inquiry. First, a race-conscious program cannot institutionalize a quota system or otherwise insulate one category of applicants from competition with another solely because of race. Id.; Gratz, 539 U.S. at 334. Second, the government must consider whether there are any workable, race-neutral alternatives. Grutter, 539 U.S. at 339. Third, the plan must not "unduly harm members of any racial group." Id. at 341. Fourth, the use of racial distinctions must be limited in time. Id. at 342.

Much of this inquiry is relevant here despite significant differences between the competitive admissions plans at issue in Gratz and Grutter and the Lynn Plan, which is non-competitive and governs only student transfers, not initial assignments. The requirement that the court consider race-neutral alternatives addresses whether the Plan is necessary; if there were a race-neutral way to achieve the benefits of diversity and reduced racial isolation, the use of race would be unnecessary and therefore not narrowly tailored. The requirements that a race-conscious policy not unduly harm members of any racial group and that it be limited in time minimize the scope of the Plan, ensuring that its use of race is no broader than necessary. The weight of these considerations may vary somewhat from the Grutter setting to ours, but they remain applicable and we will return to them shortly.

The first Grutter criterion relating to competition, however, is less useful to our narrow tailoring inquiry. The University of Michigan admissions policies were designed to "assemble a student body that is diverse in ways broader than race." Grutter, 539 U.S. at 340. Individualized assessments, in which race was only one consideration among many, were the most narrowly tailored way to achieve such diversity. The mechanical use of race, by contrast, would preclude an admissions committee from considering students' "background, experiences, and characteristics to assess [their] individual 'potential contribution to diversity.'" Gratz,

539 U.S. at 274 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (opinion of Powell, J.)).

Unlike the Gratz and Grutter policies, the Lynn Plan is designed to achieve racial diversity rather than viewpoint diversity.[9] The only relevant criterion, then, is a student's race; individualized consideration beyond that is irrelevant to the compelling interest. Cf. Brewer, 212 F.3d at 752 ("If reducing racial isolation is -- standing alone -- a constitutionally permissible goal, . . . then there is no more effective means of achieving that goal than to base decisions on race.")

The concerns motivating the individualized consideration requirement in a competitive, race-preferential admissions context that focuses on diversity along a number of axes (e.g., the Gratz and Grutter policies) are simply not present in a non-competitive K-12 transfer policy aimed at racial diversity. Because transfers under the Lynn Plan are not tied to merit, the

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[9]As we have already discussed, see supra Part III.B., the Lynn Plan's focus on racial diversity rather than viewpoint diversity is the result of contextual differences between higher education, where the emphasis is on the exchange of ideas, and primary education, where the emphasis is on fostering interracial cooperation. The district court explained this point in distinguishing Grutter, which was then pending before the Supreme Court:

> In contrast [to Grutter], the "critical mass" sought by the Lynn Plan is different, because Lynn's goal is not viewpoint diversity. As I have said, at the elementary, middle, and high school level, the goal of teaching socialization is at least as important as the subject matter of instruction. The value of a diverse classroom setting at these ages does not inhere in the range of perspectives and experience that students can offer in discussions; rather, diversity is valuable because it enables students to learn racial tolerance by building cross-racial relationships. In this context a meaningful presence of racial minorities -- and of whites at minority-dominated schools -- is crucial not only to reducing feelings of tokenism, but also to disarming stereotypes that students in the classroom majority might harbor about students of other races.

Comfort IV, 283 F. Supp. 2d at 361 n.90.

Plan's use of race does not risk imposing stigmatic harm by fueling the stereotype that "certain groups are unable to achieve success without special protection." Bakke, 438 U.S. at 298 (opinion of Powell, J.) (raising the possibility of stigmatic harm in the affirmative action context). There is also little chance that the decisive use of race in a plan concerned strictly with racial diversity creates the unwarranted presumption that race is a proxy for viewpoint. See Gratz, 539 U.S. at 271 (recognizing this as a risk when members of a group are favored based on a presumption that "persons think in a manner associated with their race"). Indeed, the Plan strives for exactly the opposite result -- that is, to preempt racial stereotypes through intergroup contact.

The plaintiffs emphasize that the Supreme Court has also criticized the mechanical use of race on the ground that it may breed cross-racial tension. As the Court recently explained in considering a prison policy of segregating prison inmates by race,

> racial classifications threaten to . . . incite racial hostility. Indeed, by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions. By perpetuating the notion that race matters most, racial segregation of inmates may exacerbate the very patterns of [violence that it is] said to counteract.

Johnson, 125 S. Ct. at 1147 (internal quotation marks, citations, and emphasis omitted). These concerns, however, are not applicable to the Lynn Plan, which takes race into account to foster intergroup contact rather than to segregate. As the Johnson Court acknowledged, "racial integration . . . tends to diffuse racial tensions and thus diminish interracial violence." Id. (citing the opinion of former corrections officials and a study finding that "the rate of violence between inmates segregated by race . . . surpassed the rate among those racially integrated").

The Lynn Plan validates this conclusion: by reducing racial isolation and increasing intergroup contact, it has ameliorated racial and ethnic tension and bred interracial tolerance. Comfort, 283 F. Supp. 2d at 376. We therefore see no reason to impose a blanket prohibition on the use of race as a decisive factor in a student transfer plan to further a compelling interest in obtaining the educational benefits of racial diversity. If a non-competitive, voluntary student transfer plan is otherwise narrowly tailored, individualized consideration of each student is unnecessary.[10]

2. The Lynn Plan

The district court determined, and we agree, that the Plan's use of transfer limits to achieve racial diversity has produced benefits central to Lynn's educational mission.[11] Under the general narrow tailoring framework, however, we must also consider whether the Plan's use of race is no broader than necessary and whether race-neutral

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[10]We note that this conclusion in no way rests on the administrative difficulties that would be inherent in individually considering each of the thousands of transfer requests that Lynn receives each year. Administrative difficulty "does not render constitutional an otherwise problematic system." Gratz, 539 U.S. at 275.

[11]Plaintiffs argue that improvements in Lynn schools cannot be attributable to racial diversity. They emphasize (i) that levels of diversity vary at schools in the district; (ii) that at least one school slipped below critical mass during the 2000-01 academic year; and (iii) that defense experts testified that all schools they visited -- including schools that had slipped below critical mass -- demonstrated the benefits that intergroup contact theory attributes to racial diversity. Plaintiffs reason that the experts' uniformly positive testimony is inconsistent with a theory that increased diversity produces increased benefits, and that the benefits must be attributable instead to race-neutral factors present in equal measure throughout the district. We do not find this argument persuasive. The defendants point out that although some of Lynn's schools occasionally fall below critical mass, those deviations are small and temporary. Students do not automatically forfeit the lessons learned from integration when they attend a school with relatively short-term or marginal deviation from critical mass.

alternatives are available. See Grutter, 539 U.S. at 339-42; see also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986) (noting that the term "narrowly tailored" requires "consideration of whether lawful alternative and less restrictive means could have been used" or that "the classification at issue must 'fit' with greater precision than any alternative means").

a. Breadth

The defendants maintain that the Plan's use of race is minimally invasive. First, it governs only voluntary transfers, rather than initial student assignments. Instead of forcing children to attend schools far from their homes, as might be the result of a controlled choice plan,[12] the Lynn Plan preserves the traditional neighborhood school model. Second, the Plan allows students to transfer freely between racially balanced schools and provides an appeals process for students whose transfer requests are denied on racial grounds.[13]

The Plan is also less burdensome on third parties here than in other contexts because of the nature of the "benefit" at issue, namely the grant of a transfer request. Every child in Lynn is guaranteed a seat in a district where, as the parties have stipulated, every school provides a comparable education. The denial of a transfer

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[12]Controlled choice plans are an alternative to neighborhood school assignments. See, e.g., Anderson, 375 F.3d at 74-77 (describing controlled choice plans used by the Boston Public Schools). "Under such programs, parents can choose among a select number of schools, but their choices and their likelihood of getting their choice are controlled to help ensure a particular racial balance." Wendy Parker, The Legal Cost of the "Split Double Header" of Gratz and Grutter, 31 Hastings Const. L.Q. 587, 603 n.76 (2003).

[13]Appeals are granted to unite siblings or when parents can show a medical, safety, or other hardship, including one based on daycare arrangements. The district court found that the Parent Information Center (Lynn's central registration office) "goes out of its way to make the appeals process accessible to everyone." Comfort IV, 283 F. Supp. 2d at 349. Additionally, a student whose appeal is denied will be presented with alternative placement options.

under the Plan is therefore markedly different from the denial of a spot at a unique or selective educational institution. See, e.g., Gratz, 539 U.S. at 251 (University of Michigan); Wessmann, 160 F.3d at 793 (Boston Latin School); cf. Wygant, 476 U.S. at 282-83 ("Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job."). This is not to say that the denial imposes no harm at all; the transfer request itself indicates that despite the availability of a comparable education at any school in Lynn, students (or their parents) do not view the schools as fungible. But in construing the narrow tailoring requirement that a race-conscious plan not unduly harm members of any racial group, we view the diminished nature of any harm here as significant.

i. Calibration

Despite the minimally invasive nature of the Plan, the plaintiffs contend that it imposes undue harm because of its calibration. Emphasizing the defense experts' testimony that the educational benefits of diversity are predicated on the presence of a critical mass of white and nonwhite students, a figure that social science literature approximates at 20%, the plaintiffs assert that the Plan's numerical guidelines are substantially more restrictive than necessary. In their view, a plan narrowly tailored to the defendants' compelling interest in the benefits of educational diversity would prohibit only those transfers that would upset critical mass. They point out that because the Plan is calibrated around district demographics rather than around critical mass, it prohibits some transfers that do not bring a school population below 20% white. For example, because nonwhites made up 58% of Lynn's student population at the time of trial, an elementary school with a 40% nonwhite enrollment qualified as racially isolated, and therefore subject to transfer limits, even though it

contained a critical mass of white and nonwhite students.[14]

In response, the defendants rely on expert testimony that while critical mass is the point at which educational benefits begin to accrue, those benefits increase as a school nears an even balance between white and nonwhite students. Relying on this evidence, the district court found that "gains occur along a continuum: as the racial composition of school populations creeps closer to balanced, racial stereotyping and tension is [sic] reduced and racial harmony and understanding increase." Comfort IV, 283 F. Supp. 2d at 357. It thus concluded that the Plan was narrowly tailored, despite its orientation around district demographics rather than critical mass. See id. at 384 (The Plan "effectively generates integration in Lynn's schools in such quantity as to catalyze intergroup contact while still respecting the neighborhood school principle and Lynn's ever-changing demographics.").

We agree with the district court's reasoning. The Plan does not seek racial balancing for its own sake, nor does it use rigid quotas to ensure a pre-determined level of diversity at each of Lynn's schools. See Grutter, 539 U.S. at 335-36 ("The . . . goal of attaining a critical mass of [nonwhite] students does not transform [a] program into a quota."). Rather, the transfer policy conditioned on district demographics (+/- 10-15%) reflects the defendants' efforts to obtain the benefits of diversity in a stable learning environment.[15] The Plan thus provides a

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[14]Under the Plan, an elementary school is racially isolated if its nonwhite enrollment falls more than 15% below the percentage of Lynn's total student population that is nonwhite. If Lynn's student population was 58% nonwhite, as it was during the 2001-02 academic year, a school whose student body was less than 43% nonwhite (i.e., more than 15% below 58%) was racially isolated.

[15]This conclusion is bolstered by the testimony of Dr. Orfield, a nationally recognized expert on school desegregation, who concluded that the Plan "used race no more than was necessary to allow Lynn to

sufficiently close "fit" to the defendants' compelling interest to ensure that "'the motive for the classification was [not] illegitimate racial prejudice or stereotype.'" Id. at 333 (quoting Croson, 488 U.S. at 493 (plurality op.)).

The plaintiffs launch a second attack at the Plan's calibration on the grounds that it is inconsistent with the defendants' statements that the benefits they seek maximize as a school moves closer to 50% white/nonwhite. They point out that as of December 2004, Lynn's student population was more than 61.9% minority. A middle school that is 50% minority (the proportion that the defendants have described as ideal) would now fall outside of the +/- 10% range for racial balance and would instead be considered racially isolated, resulting in transfer limitations.

This argument misses the mark. The Lynn Plan's goal is to improve the racial balance not of any particular school, but across the school system as a whole. The optimal balance for each school might well be 50%, but Lynn's 61.9% minority population means that for every school closer to that ideal, another will be further away from it. Evaluating schools by reference to the racial composition of the city's population is a sensible way for Lynn to strive for the best racial balance attainable across its entire school system, while acknowledging that practical constraints make it impossible for Lynn to have an equal population of minority and non-minority students in every individual school.

ii. White/nonwhite distinction

In addition to challenging the Plan's numerical ranges, the plaintiffs also argue that the Plan is not narrowly tailored to advance a compelling interest in racial diversity because it paints with too broad a brush by distinguishing only between white and nonwhite students, thereby blurring the many subgroups within

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meet its educational goal of preparing students to live in a multiracial society." Comfort IV, 283 F. Supp. 2d at 355.

each category. However, this white/nonwhite distinction reflects the reality of Lynn's experience. As the district court found, before the Plan, "racial divisions and ethnic conflict between students occurred predominantly along a white/nonwhite axis. The growing gap in understanding between these groups burdened the schools in ways that more precise shades of racial and ethnic difference did not." Comfort IV, 283 F. Supp. 2d at 379. By increasing diversity along the white/nonwhite axis, the Plan reduced racial tensions and produced positive educational benefits. Narrow tailoring does not require that Lynn ensure diversity among every racial and ethnic subgroup as well. See Grutter, 539 U.S. at 316 (noting that the Law School sought to enroll a critical mass of "minority" students, a category that included African-Americans, Hispanics, and Native Americans).

iii. Duration

A narrowly tailored plan must be limited not only in scope, but also in time. See id. at 342. The Court held in Grutter that this durational requirement can be met by "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." Id. The Lynn Plan includes such review. The PIC continuously monitors the schools' demographics, gathering data on racial composition and transfers. Under the Plan, transfer limits are suspended among schools that are racially balanced. Comfort IV, 283 F. Supp. 2d at 377. This feature is not merely theoretical. Students may now transfer freely among all three Lynn high schools. Lynn has also periodically reevaluated the calibration of its Plan with an eye toward maximizing the availability of transfers while maintaining diverse schools. Id. at 348 n.38 (noting that the Plan's original 10% range was expanded to 15% for elementary schools to "permit more choice" and that Lynn considered a 20% range in 1994 but determined that it would compromise student body diversity). We expect that Lynn will continue to do so, presuming, as did the Grutter Court,

that school officials will demonstrate a good faith commitment to monitoring the continued need for racial restrictions. See 539 U.S. at 343.

b. Consideration of race-neutral alternatives

Because narrow tailoring dictates that the government use race only when necessary to achieve a compelling interest, it requires "serious, good-faith consideration of workable race-neutral alternatives that will achieve the diversity [the government actor] seeks." Grutter, 539 U.S. at 339; see also Wygant, 476 U.S. at 280 n.6. Here, the defendants have met their burden. The record reflects that they seriously considered, and plausibly rejected, a number of race-neutral alternatives. These included (i) a no-transfer policy, see Comfort IV, 283 F. Supp. 2d at 387-88 (crediting evidence from a demographics expert that instituting such a policy would throw several elementary schools into racial imbalance); (ii) a policy of unrestricted transfers, see id. at 388 (crediting evidence that instituting such a policy would result in 500 to 800 segregative transfers per year); (iii) a redrawing of district lines, see id. at 387-88 (noting that this would be impractical); (iv) forced busing, see id. at 387-88 (concluding that the problems that accompany forced busing justified Lynn's rejection of a controlled choice scheme); (v) a lottery system, see id. at 389 (finding that demographic and scheduling factors made this impracticable); and (vi) a plan conditioning transfers on socioeconomic status, rather than race, see id. at 389 n.100 (noting that because of residential patterns, this system would exacerbate existing racial imbalance).

The plaintiffs argue that there are several other alternatives that the defendants failed to consider. They point specifically to a Department of Education study reviewing successful race-neutral programs based on socioeconomic status or a lottery, see U.S. Dep't of Educ., Achieving Diversity: Race-Neutral Alternatives in American Education (Feb. 2004), available at http://www.ed.gov/about/offices/list/ocr/raceneutral.html,

and to the race-neutral student assignment plan adopted in Boston, see Anderson, 375 F.3d at 76-77. As noted, Lynn has already considered, and rejected, the possibility of basing student assignments on socioeconomic status or a lottery. While the record does not reflect whether Lynn has considered the Boston plan in depth, we note that the Boston plan is specific to the residential patterns in Boston, which differ from those in Lynn. Lynn must keep abreast of possible alternatives as they develop, see Grutter, 539 U.S. at 342-43, but it need not prove the impracticability of every conceivable model for racial integration. It is sufficient that it demonstrate a good faith effort to consider feasible race-neutral alternatives, as it has done here. We therefore hold that the Lynn Plan is narrowly tailored to the defendants' compelling interest in obtaining the benefits of racial diversity.

D. Related Federal Claims

The plaintiffs also advance several statutory equal protection claims, contending that the Lynn Plan violates, inter alia, 42 U.S.C. " 1981 and 1983,[16] and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.[17] Our resolution of the constitutional equal protection challenge controls those claims. Title VI "'proscribe[s] only those racial classifications that would violate the Equal Protection Clause.'" Alexander v. Sandoval 532 U.S. 275, 280-281 (2001) (quoting Bakke, 438 U.S. at 287 (Powell, J.)). Courts have also treated the bar on racial discrimination imposed by §1981 and §1983 as coextensive with the protections of the Equal Protection Clause. See Mescall v. Burrus, 603 F.2d 1266, 1271 (7th

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[16]42 U.S.C. § 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to the full and equal benefit of all laws." 42 U.S.C. § 1983 provides a cause of action based on the deprivation of constitutional rights "under color of any statute, ordinance, regulation, custom, or usage, of any State."

[17]Title VI forbids racial discrimination "under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

Cir. 1979) ("The relationships of " 1981 and 1983 to the Fourteenth Amendment are so close . . . that we believe the use of each section must be guided by the principles announced by the Supreme Court for application of the Fourteenth Amendment to discrimination cases."); see also Anderson, 375 F.3d at 77 n.7 (concluding that plaintiffs' claims under Title VI, §1981 and §1983 "turn on the resolution of the equal protection claim"). The district court was therefore correct in holding that the plaintiffs are not entitled to federal statutory relief.

IV. Article 111

Article 111 of the Massachusetts Declaration of Rights provides that "[n]o student shall be assigned to or denied admittance to a public school on the basis of race, color, national origin[,] or creed." Plaintiffs contend that when a child is prevented from making a segregative transfer under the Lynn Plan, he is illegally "denied admittance to a public school on the basis of race." Mass. Const. amend. art. 111. The district court rejected this position as inconsistent with the meaning of Article 111, which was designed to limit forced busing and to protect neighborhood schools. Comfort IV, 283 F. Supp. 2d at 393. The court also emphasized that although "no court has ever expressly interpreted Article 111, the SJC [i.e., the Massachusetts Supreme Judicial Court] has consistently construed similarly worded statutes narrowly, holding that they do not categorically ban suspect classifications but rather merely subject them to strict scrutiny." Id. Finally, the district court suggested that if Article 111 were read broadly to prohibit any race-conscious student assignment plan, as the plaintiffs urge, it would likely run afoul of the federal Constitution and other sections of the Massachusetts Declaration of Rights. Id. We review the district court's interpretation of the Article de novo.[18]

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[18]The defendants assert that we should not consider the substance of the Article 111 claim at all, maintaining that the Commonwealth was a necessary party to adjudicate this claim but could not be joined because of the Eleventh Amendment, see Fed. R. Civ. P. 19(b).

See Blockel v. J.C. Penney Co., Inc., 337 F.3d 17, 29 (2003).

Although the SJC has not yet considered Article 111, it has identified the considerations that guide judicial interpretation of the state's constitution:

> In determining the meaning of a constitutional provision, we look to the language and structure of the provision, so that it is construed so as to accomplish a reasonable result and to achieve its dominating purpose. We do so bearing in mind the Constitution was written to be understood by the voters to whom it was submitted for approval. It is to be interpreted in the sense most obvious to the common intelligence. Its phrases are to be read and construed according to the familiar and approved usage of the language. The words of a constitutional provision are to be given their natural and obvious sense according to common and approved usage at the time of its adoption.
>
> Moreover, the Constitution is to be interpreted in the light of the conditions under which it and its several parts were framed, the ends which it was designed to accomplish, the benefits which it was expected to confer, and the evils which it was hoped to remedy.

McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 523 (Mass. 1993) (citations and internal quotation marks omitted).

To determine whether Article 111 prohibits a race-conscious plan for voluntary student transfers, we begin, as the SJC has instructed, with the language of the provision. Id. at 524. The plaintiffs contend that the plain

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Alternatively, they urge us to certify a question regarding the proper interpretation of Article 111 to the SJC pursuant to Mass. R. Sup. Jud. Ct. 1:03. We reject both contentions, finding it appropriate to reach the merits as the district court did.

language of the Article unequivocally invalidates the Lynn Plan. They reason that when a student is precluded from transferring because of the transfer's impact on racial balance, that student is "denied admittance to a public school on the basis of race" within the meaning of Article 111.

It is not readily apparent, however, that a student denied a transfer is "denied admittance" to a school within the meaning of the provision. The Article's pairing of the terms "assigned" and "denied admittance" suggests that it contemplated initial student placements, not subsequent transfers. Under the Lynn Plan, students are assigned to their neighborhood schools without regard to race; conversely, no student is denied that placement based on race. Only after a student has been assigned to a school and wishes to transfer does race enter the calculus.

The "specific circumstances of the adoption" of Article 111, see McDuffy, 615 N.E.2d at 528, convince us that the provision does not preclude such a plan. Article 111 was adopted as an amendment to the Massachusetts constitution in 1978. The House and Senate bills that became Article 111 were introduced by legislators on behalf of Massachusetts Citizens Against Forced Busing. See Comfort IV, 283 F. Supp. 2d at 395. When the bill was presented to voters for ratification, the constitutionally required description that accompanied it[19] explained:

> A "YES VOTE" would guarantee the right of parents or guardians of school-age children to educate those children free from any arbitrary assignment by school authorities to schools

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[19]The Massachusetts Constitution requires the Secretary of State to publish and distribute information regarding ballot questions, including the full text of every measure, "a fair, concise summary of the measure as such summary will appear on the ballot [and] other information and arguments for and against the measure." Mass. Const. art. 48, Gen. Prov., pt. IV, as amended by arts. 74 and 108.

> outside the school district. Any public assignment to a school outside the school district, based on achieving any established racial quota-system or ethnic balance[,] would require the permission of a parent or guardian.

Id. (citing Massachusetts Information for Voters (1978)); see also Bates v. Dir. of Office of Campaign and Political Finance, 763 N.E.2d 6, 22-23 (Mass. 2002) (using Information for Voters statement as an aid to statutory construction).

We would be hard-pressed to extrapolate from these circumstances an intent that Article 111 bar an entirely voluntary student transfer program narrowly tailored to a compelling interest in the educational benefits of diversity. As the district court noted, "'the benefit [Article 111] was expected to confer' was preservation of neighborhood schools, and the 'evil which it was hoped to remedy' was the politically divisive resort to forced busing." Comfort IV, 283 F. Supp. at 395 (quoting McDuffy, 615 N.E.2d at 523). The Lynn Plan advances those goals. It protects neighborhood school assignments and does not entail any forced non-neighborhood assignments. Race-conscious transfers occur only if initiated by a student's parent or guardian, a result entirely consistent with the explanation of the Article put before the voters.

The plaintiffs do not dispute that Article 111 was designed to prevent forced busing. Rather, they argue that any inquiry into the Article's legislative history is improper because the provision is clear on its face. As we have already explained, the application of the Article to the context of voluntary transfers is not entirely clear from the statutory language. Moreover, the SJC has expressly provided that the state constitution's words "must be given a construction adapted to carry into effect its purpose." Cohen v. Att'y Gen., 259 N.E.2d 539, 543 (Mass. 1970) (quoting Tax Comm'r v. Putnam, 116 N.E. 904, 906 (Mass. 1917)). The Article's legislative history

helps us determine its purpose, and thereby points us to a construction that furthers that purpose. Looking to legislative history is therefore entirely consistent with the principles of constitutional interpretation set forth by the SJC.

Our conclusion that the Lynn Plan does not violate Article 111 would be the same even if the Article did apply to a voluntary transfer system. As the district court recognized, the SJC has treated provisions similar to Article 111 not as banning the use of race outright, but rather as subjecting the use of race to strict scrutiny. Comfort IV, 283 F. Supp. 2d at 396; see also McDuffy, 615 N.E.2d at 545 (noting that the court's decision on a matter of first impression was consistent with earlier decisions).

In Attorney General v. Massachusetts Interscholastic Athletic Association, Inc., 393 N.E.2d 284 (Mass. 1979), the SJC considered a challenge, brought under the Massachusetts Equal Rights Amendment ("ERA") and a state statute, to a rule prohibiting boys from joining girls' sports teams. The ERA provides that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Mass. Const. pt. 1, art. 1, as amended by art. 106. The relevant statute provides: "[n]o person shall be excluded from or discriminated against in admission to a public school . . . or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, religion, national origin or sexual orientation." Mass. Gen. L. ch. 76, ' 5. Although both of these provisions speak in absolute terms, the SJC did not treat them as automatically invalidating the gender-based prohibition at issue. Rather, it subjected the "no boys on girls' teams" rule to something akin to strict scrutiny. 393 N.E.2d at 291-93. We have already determined that the Lynn Plan survives the strict scrutiny required by the federal Equal Protection Clause. Therefore, it would also survive review under Article 111, if the Article did apply in this context. Either way, the plaintiffs' claim fails.

V. Recusal

Finally, the plaintiffs assert that the district court judge should have recused herself from this case. Their argument is as follows: (1) prior to her appointment to the federal bench, Judge Gertner was a member of the Lawyers' Committee for Civil Rights ("LCCR"), a nonprofit organization; (2) LCCR unsuccessfully moved to intervene in this litigation on the side of the defendants, and therefore (3) the law required that Judge Gertner recuse herself. Judge Gertner denied the recusal motion in an order dated March 21, 2002. We review that ruling for abuse of discretion. Camacho v. Autoridad de Telefonos, 868 F.2d 482, 490 (1st Cir. 1989).

The controlling statute is 28 U.S.C. ' 455, which sets forth the standards for recusal. That statute provides that a judge "shall" recuse herself "in any proceeding in which [her] impartiality might reasonably be questioned." Id. ' 455(a). A party who suggests that recusal is appropriate must support the motion with facts that "provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality." In re Boston's Children First, 244 F.3d 164, 167 (1st Cir. 2001) (quoting In re United States, 666 F.2d 690, 694 (1st Cir. 1981)). The plaintiffs have failed to make this showing.

Every judge comes to the bench with a lifetime of background experiences, a roster of associations, and a myriad of views. This past history, in and of itself, is seldom sufficient to require recusal. Brody v. President & Fellows of Harvard Coll., 664 F.2d 10, 11 (1st Cir. 1981) (per curiam). Unless there is a direct link that establishes a reasonable basis for doubting impartiality, the judge should not step aside. In re United States, 158 F.3d 26, 31 (1st Cir. 1998); cf. United States v. Giorgi, 840 F.2d 1022, 1035 (1st Cir. 1988) (explaining that unless a party can establish a reasonable factual basis to doubt a judge's impartiality "by some kind of probative evidence," then the "judge must hear a case as assigned") (internal quotation marks omitted).

These principles govern our decision here. LCCR is not a party to this case. Even if it were, Judge Gertner's relationship with that organization ended when she took the bench on February 14, 1994. There is no allegation that she has maintained ties with the LCCR. Given the eight-year interval between the end of the judge's connection with LCCR and the recusal motion, her prior association with that organization cannot be the basis for a reasonable attack on her impartiality. Thus, recusal was not obligatory. See, e.g., Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1117 (4th Cir. 1988) (holding that an association with a nonprofit organization that ended a decade before the proceedings commenced does not form a reasonable basis for questioning the trial judge's impartiality, even though the nonprofit organization was a party to the litigation); cf. Veneklase v. City of Fargo, 236 F.3d 899, 901 (8th Cir. 2000) (finding recusal unnecessary where judge's former law firm had represented parties tangentially involved in civil rights suit); United States v. Story, 716 F.2d 1088, 1090 (6th Cir. 1983) (finding recusal unnecessary where judge had represented victim in will contest matter thirteen years earlier).

The plaintiffs' argument that our decision in Boston's Children First dictates recusal here ignores an important difference between the two cases. In Boston's Children First, we ordered recusal not because of the judge's past association with civil rights organizations, but because the judge had publicly commented on a pending case. See 244 F.3d at 169-70. The judge's passing comment in this case that LCCR was eligible to apply for amicus status does not constitute a basis on which to require recusal.

The plaintiffs' claim of bias is equally unpersuasive. The only evidence of bias they cite involves their view of the judge's policy preferences. That perception, standing alone, does not warrant our interference with the district judge's recusal decision. If judges were subject to disqualification on such a basis, our judicial system would be paralyzed. See Camacho, 868 F.2d at 491. We

therefore conclude that the court did not abuse its discretion in denying the motion for recusal.

Affirmed.

- Concurring and Dissenting Opinions Follow -

BOUDIN, Chief Judge, concurring. The Lynn plan at issue in this case is fundamentally different from almost anything that the Supreme Court has previously addressed. It is not, like old-fashioned racial discrimination laws, aimed at oppressing blacks, e.g., Brown v. Bd. of Educ., 347 U.S. 483 (1954); Strauder v. West Virginia, 100 U.S. 303 (1880); nor, like modern affirmative action, does it seek to give one racial group an edge over another (either to remedy past discrimination or for other purposes). E.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). By contrast to Johnson v. California, 125 S. Ct. 1141 (2005), the plan does not segregate persons by race. See also Loving v. Virginia, 388 U.S. 1 (1967). Nor does it involve racial quotas. E.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 273-79 (1978).

Instead, the plan uses race as an express criterion to permit transfers where they are consistent with maintaining schools with a racial mix of students, and to limit transfers where they would increase racial imbalance within the school system beyond certain predetermined limits. The plan does not purport to favor one race over another, nor have the parties claimed that it does so. Every child can as a matter of right attend his or her local school. And the parties have stipulated that Lynn's schools are educationally equal in quality; thus a child who is unable to transfer to a non-local school of choice is not relegated to an inferior education.

Whether such a plan is desirable as a matter of social policy is open to reasonable debate. So, too, are claims as to the extent of educational or civic benefits derived from the plan. But, in the absence of a constitutional violation, these choices are customarily left to legislatures, city councils, school boards and voters. Cf. Harris v. McRae, 448 U.S. 297, 326 (1980). Indeed, one of the advantages of our federal regime is that different communities try different solutions to common problems and gravitate toward those that prove most successful or seem to them

best to suit their individual needs. See United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

Some may be offended by any express use of race as a touchstone for transfers, believing that a race-based criterion is the wrong lesson for school boards to teach and students to absorb. But ours is a society with a heritage of racial problems growing out of generations of slavery and post-slavery segregation, and it may be unrealistic to suppose that everything will work out well if only race is ignored in every context. In any event, the Supreme Court has upheld the use of race-conscious solutions in certain settings.[20] The question is where and how one draws the line.

If we knew how the Supreme Court would decide the case before us, it would be right to adopt its answer in advance--whatever this court's members might prefer. Cf. Wessmann v. Gittens, 160 F.3d 790, 809-10 (1st Cir. 1998) (Boudin, J., concurring). But where the outcome in the Supreme Court is uncertain and past pronouncements were made in contexts different than the one now presented, the appellate court must exercise its own judgment on whether the local plan is constitutionally forbidden. There is very little to be said for mechanically extrapolating from general phrases visibly addressed to different issues. United States v. Jerrold Elecs. Corp., 187 F. Supp. 545, 555-56 (E.D. Pa. 1960), aff'd, 365 U.S. 567 (1961) (per curiam).

Treated as an open question, this is a difficult case. The Supreme Court's language disfavors racial tests and, without flatly forbidding them, has restricted their use with particular rubrics (compelling interest, narrow tailoring). See, e.g., Adarand, 515 U.S. at 227. But such rubrics depend on degree and context; there is no yardstick that crisply determines when an interest is compelling enough or how narrow is sufficiently so. The

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[20]See, e.g., Grutter v. Bollinger, 539 U.S. 306 (2003); Fullilove v. Klutznick, 448 U.S. 448 (1980); Bakke, 438 U.S. 265; cf. Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971).

way the Lynn plan uses race is certainly more benign than laws that favor or disfavor one race, segregate by race, or create quotas for or against a racial group.

The goal of the Lynn plan--to achieve the educational and civic benefits of exposing youngsters to those of different races--is not unlawful; the attack is upon the means. Yet given the goal, it is not easy to see how it can be achieved in a community like Lynn without using race as a touchstone. The problem is that in Lynn, as in many other cities, minorities and whites often live in different neighborhoods. Lynn's aim is to preserve local schools as an option without having the housing pattern of de facto segregation projected into the school system. The choice is between openly using race as a criterion or concealing it through some clumsier proxy device (e.g., transfer restrictions based upon family income).

If the plan were patently offensive to core equal protection principles, this would be an easy case. But the Lynn plan is far from the original evils at which the Fourteenth Amendment was addressed. The Fourteenth Amendment sought to forbid the oppression of one race by another. We are here working from doctrines concerning the use of race-based criteria that are mainly the product of twentieth-century jurisprudence. This is not a case in which, against the background of core principles, all doubts should be resolved against constitutionality.

Rather, we are faced with a local experiment, pursuing plausible goals by novel means that are not squarely condemned by past Supreme Court precedent. The problems that the Lynn plan addresses are real, and time is more likely than court hearings to tell us whether the solution is a good one; indeed, indications so far are that Lynn's efforts have met with success. To bring that success to a halt in this court seems neither advisable nor necessary. The Supreme Court has not passed upon a plan anything like the one before us. That Court is free to extend its precedents to the present context, but that is its role--not ours. Cf. State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

SELYA, Circuit Judge (with whom HOWARD, Circuit Judge, joins), dissenting. While no two cases are exactly alike, the function of the judiciary in passing upon a constitutional challenge is to read the pertinent text of the Constitution, examine the universe of relevant legal precedents, extract guiding principles from that case law, and apply those principles to the facts at hand. This case, like most cases, presents a factual scenario that contains certain idiosyncratic elements. There is neither a Supreme Court decision squarely addressing whether racial diversity alone may constitute a compelling interest sufficient to justify the government's race-conscious preferences nor one addressing the narrow tailoring of racial classifications in voluntary, non-competitive school transfer plans. The majority accentuates those idiosyncracies, but chooses to overlook the elephant in the room: the fact that this case arises against a backdrop of Supreme Court jurisprudence, recently revisited in Grutter v. Bollinger, 539 U.S. 306 (2003), and Gratz v. Bollinger, 539 U.S. 244 (2003), that must guide our decision.

The majority's eagerness to justify departing from precedent frees it to strike out on its own, fashioning a rule that flies in the teeth of the Supreme Court's stalwart opposition to the use of inflexible, race-determinative methods in granting or denying benefits to citizens.[21] Because that departure is inconsistent with the role that an intermediate appellate court should play in the federal system, I respectfully dissent.

To my mind, the precedents are rather clear. The two latest Supreme Court decisions illustrate the point. I begin by briefly rehearsing the facts upon which those decisions turned.

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[21]While such methods may be justified to remedy the effects of past discrimination, see, e.g., Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971), no such justification exists in this case.

Gratz involved the University of Michigan's undergraduate admissions program. The University automatically assigned 20 points – one-fifth of the 100 points needed to guarantee admission – to an applicant from an underrepresented racial or ethnic minority group. Gratz, 539 U.S. at 255. This 20-point bonus effectively made race/ethnicity determinative for minimally qualified minority applicants. Id. at 272.

Grutter involved law school admissions. The law school took race into account as one of several variables in an individual's application. Grutter, 539 U.S. at 340. The school assigned no mechanical score based on an applicant's race; instead, it considered race only as one of several possible ways in which an applicant could enrich the diversity of the student body. Id. at 315-16. Moreover, the school set no quotas for racial or ethnic minorities. Id. at 335-36.

The Supreme Court struck down the plan used in Gratz while upholding the one used in Grutter. In arriving at these decisions, the Court made it crystal clear that a race-conscious admissions program must use race in "a flexible, non-mechanical way" if it is to be considered narrowly tailored (and, thus, if it is to pass constitutional muster). Id. at 334. Such a plan cannot institutionalize a quota system or in any way insulate one category of applicants from another solely on account of race. See id.; Gratz, 539 U.S. at 253, 270-72. Race can, however, be used as a plus factor in the course of individualized consideration of each applicant. Grutter, 539 U.S. at 334.

The majority, emphasizing that context matters, simply writes this requirement out of the narrow-tailoring analysis. That, to me, requires more than a soupcon of legal legerdemain. While I agree that context matters, the Supreme Court has catalogued a compendium of dangers flowing from the mechanical, inflexible, and exclusive use of race as a determinant. For one thing, such an approach insulates the preferred category of applicants from competition with other

applicants. Grutter, 539 U.S. at 334. For another thing, such an approach feeds the stereotype that students from the preferred group lack academic merit and, thus, raises the specter of stigmatic harm. See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (opinion of Powell, J.) (stating that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection").

The majority argues that these dangers are less ominous in a setting, like this one, that neither skews a competitive process nor substitutes race as a proxy for academic merit. But competitive disadvantage and the substitution of race for academic merit are not the only reasons behind the Supreme Court's understandable disdain for quotas and other inflexible uses of racial determinants. Regardless of the burden imposed by a racial preference, the simple act of granting benefits based on a quota or other mechanical use of race will breed cross-racial tension. See Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality op.). Moreover, when government indulges in the automatic and unflinching use of race in the bestowal of any benefit, that usage counteracts the ultimate goal of relegating racial distinctions to irrelevance. Id. at 495. As the Court reminded us earlier this year, the mechanical use of racial classifications inflicts stigmatic harm wherever and whenever it occurs – a consequence that is by no means limited to contexts that involve schools, students, or academic merit. See Johnson v. California, 125 S. Ct. 1141, 1147 (2005) (explaining in a prison context that "racial classifications threaten to stigmatize individuals by reason of their membership in a racial group" and "perpetuate the notion that race matters most").

Nothing in either Grutter or Gratz (or in any other case, for that matter) dispels the notion that mechanical, race-based programs work this harm – and, indeed, the Lynn Plan inflicts it upon a number of students seeking to benefit from a program that Lynn knows is appealing without regard to racial reasons. To illustrate, consider

that the Plan can succeed only if the opportunity to transfer to a distant school is attractive to parents. It is conceivable that some parents would transfer a child out of a desire to have the child learn in a more integrated environment. But the Lynn Plan actively creates and exploits other methods of benign coercion in search of its goal. For instance, Lynn admits that a major function of its "theme" schools is to entice parents to transfer their children. Another method is selling convenience to parents. School officials are aware that some of schools are located near after-school programs or near high-employment areas. Every student, of every race, in every school zone, has some potential benefit – yet the school committee's policy evaluates whether students may take part in the transfer program based solely on the color of a student's skin. Only after experiencing a racially based rejection can an affected student plead for relief from the stated policy.

In one sense, then, this plan is even more harmful than the racially inflexible program struck down in Gratz. There, prospective non-minority students could be admitted by the terms of the policy itself and thus those who were rejected could look to something other than race as a reason for their failure.

The majority writes off these concerns, stating that Lynn's goal is increased racial harmony for the student body as a whole. But the end cannot be allowed to justify the use of unconstitutional means; even laudable goals must be attained in constitutional ways. The Lynn Plan's inflexible use of race offends this principle.

Moreover, the majority's attempted justification misses a crucial point. The Fourteenth Amendment protects individuals, not groups. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). There is a harm inflicted on a student when her government denies her transfer for the sole or determinative reason of race – an immutable condition that she cannot change. That harm cannot be ignored simply because it serves what others (be they school committee members or my distinguished

colleagues) perceive as a greater good. Cf. Grutter, U.S. at 341 (holding that narrow tailoring requires program to not unduly harm members of any racial group).

If more were needed – and I doubt that it is – the mechanical use of race is not necessary to meet the compelling interests that Lynn asserts here. A flexible, race-conscious transfer program, creating a strong but non-determinative "plus" factor for integrative transfers but permitting other transfers based on the strength of individual requests, would serve to increase diversity and avoid the harm arising from an unflinching use of race. The children rejected for transfer under such a plan would not be rejected solely because of the color of their skin but because the reasons supporting their transfer requests were comparatively insubstantial. That kind of harm is not constitutionally suspect.

Lynn hardly can be heard to complain that such a plan is unworkable. By its own admission, it already allows more than half of the students denied transfers under its race-based policy to have an exemption for non-race-related reasons. These transfers have not undermined the benefits of diversity in the school community. The city persists, however, in subjecting all the students who request transfers to what is in effect a two-tier process – one in which the student is evaluated solely on the basis of color and a second in which a rejected student must convince the school that his or her color should not matter.

Many good things can be said about the Lynn Plan. I do not doubt that it is well-intentioned and that it has helped to promote greater diversity in the public schools. But the overriding fact is that it unnecessarily inflicts racially based wounds on a large and diverse group of its students and, consequently, fails to satisfy the narrow-tailoring requirement set out in the Supreme Court's equal protection jurisprudence. Because that is so, I must respectfully dissent from what I view to be an erroneous decision.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 03-2415

SAMANTHA J. COMFORT, ETC., ET AL.,
Plaintiffs, Appellants,

v.

LYNN SCHOOL COMMITTEE ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nancy Gertner, U.S. District Judge]

Before

Selya, Dyk* and Howard,

Circuit Judges.

Michael Williams, with whom Robert J. Roughsedge, Chester Darling, and Citizens for the Preservation of Constitutional Rights were on brief, for plaintiffs.

* Of the Federal Circuit, sitting by designation.

Sharon L. Browne on brief for Pacific Legal Found., amicus curiae.

Richard W. Cole, Assistant Attorney General, with whom Thomas F. Reilly, Attorney General, and John R. Hitt, Assistant Attorney General, were on brief, for state defendants.

John C. Mihos, with whom James P. Lamanna, Assistant City Solicitor, was on consolidated brief for municipal defendants.

Edward J. Barshak and Sugarman, Rogers, Barshak & Cohen, P.C. on brief for Asian-Am. Lawyers Ass'n of Mass., Boston Bar Ass'n, Community Change, Inc., Fair Housing Center of Greater Boston, Jewish Alliance for Law and Social Action, New Engl. Area Conf. of the NAACP, and Greater Boston Civil Rights Coalition, amici curiae.

Patricia A. Brannan, Maree Sneed, and Hogan & Hartson LLP on brief for Council of the Great City Schools, Am. Ass'n of Sch. Adm'rs., Nat'l Ass'n of Secondary Sch. Principals, Nat'l Educ. Ass'n, Nat'l Sch. Bds. Ass'n, and Public Educ. Network, amici curiae.

Nathalie F.P. Gilfoyle, General Counsel, Lindsay Childress-Beatty, Deputy General Counsel, David W. Ogden, and Wilmer Cutler Pickering Hale and Dorr LLP on brief for Am. Psychological Ass'n, amicus curiae.

Theodore M. Shaw, Director-Counsel, Norman J. Chachkin, and Chin Quang Le on brief for Northshore Branch of the NAACP, NAACP Legal Defense & Educ. Fund, Inc., Lawyers' Comm. for Civil Rights of the Boston Bar Ass'n., and various individuals, amici curiae.

Donna Brewer MacKenna and Casner & Edwards, LLP on brief for Lynn Bus. Educ. Found. and Lynn Bus. P'ship, Inc., amici curiae.

Thomas Miller, Attorney General (Iowa), Eliot Spitzer, Attorney General, Caitlin J. Halligan, Solicitor General, Michael Aronowitz, Deputy Solicitor General, Natalie R. Williams, Deputy Bureau Chief, and Hilary B. Klein, Assistant Attorney General (New York), G. Steven Rowe, Attorney General (Maine), and Mark L. Shurtleff,

Attorney General (Utah), on brief for States of Iowa, New York, Maine, and Utah, amici curiae.

Thomas J. Henderson, Derek Black, Harris J. Yale, Bernadette McCann Ezring, Samantha G. Fisherman, Virginia Johnson, and Weil, Gotshal & Manges LLP on brief for Lawyers' Comm. for Civil Rights Under Law, amicus curiae.

David B. Broughel and Day, Berry & Howard LLP on brief for Mass. Coalition for Equitable Educ., Mass. Teachers Ass'n, Mass. Fed'n of Teachers, Mass. Ass'n of Sch. Superintendents, Metro. Council for Educ. Opportunity, Inc., Center for Law and Educ., Citizens for Pub. Sch., Mass. Ass'n of Hispanic Attorneys, League of Women Voters of Mass., Mass. Law Reform Inst., Alliance for High Standards NOT High Stakes, Schott Center for Public and Early Educ., Nat'l Center for Fair & Open Testing, and Progressive Jewish Alliance, amici curiae.

Angelo N. Ancheta on brief for Civil Rights Project at Harvard Univ., amicus curiae.

October 20, 2004

SELYA, Circuit Judge. This appeal requires us to review certain features of a voluntary plan for scholastic improvement and elimination of racial isolation adopted in Lynn, Massachusetts (the Lynn Plan). Under that arrangement, each student is entitled to attend his or her neighborhood school from kindergarten through the twelfth grade (K-12). Those assignments are race-neutral. The rub, however, is that if a student wishes to transfer to a non-neighborhood school, the school system restricts the right of transfer based on the student's race and the racial makeup of the transferor and transferee schools.

Parents whose children were denied the right to transfer on race-conscious grounds challenged the

transfer provisions of the Lynn Plan, claiming, inter alia, that those provisions violate rights secured to them under the Equal Protection Clause of the United States Constitution. The district court rejected the parents' asseverational array (including their equal protection challenge), and this appeal ensued.

To resolve the equal protection issue, we turn to the Supreme Court's recent decisions in Grutter v. Bollinger, 539 U.S. 306 (2003), and Gratz v. Bollinger, 539 U.S. 244 (2003). We remain cognizant, however, that the factual backdrop for our inquiry differs in two critical respects: first, the Lynn Plan operates at the K-12 level, not at the university level; and second, the Lynn Plan restricts voluntary transfers, not competitive admissions. After careful perscrutation of an amplitudinous record, we conclude that the Lynn School Committee has made a persuasive case that racial diversity in K-12 education may produce real educational benefits. Nevertheless, we conclude that the Lynn Plan as currently conceived transgresses the Equal Protection Clause because it is not narrowly tailored to meet the school system's asserted interest.

Other issues lurk at the periphery of this appeal. We treat the federal statutory claims mounted by the plaintiffs pursuant to 42 U.S.C. § 1983 and Title VI as congruent with their equal protection claim, but treat their other federal statutory claims as mooted by our equal protection determination. We dismiss for want of standing the plaintiffs' challenge to the state law that prompted the adoption of the Lynn Plan. That leaves the plaintiffs' insistence that the district judge should have disqualified herself from presiding in this matter. Because this case will require further proceedings below, we address that issue and hold that recusal was not obligatory. In the end, we reverse the ruling sanctioning the disputed transfer provisions, vacate the judgment, affirm the district court's denial of the plaintiffs' motion for recusal, and remand for further proceedings consistent with this opinion. On remand, we direct the

district court to enter a revised judgment granting, inter alia, appropriate declaratory and injunctive relief to the plaintiffs.

I. BACKGROUND

The district court has laid out the relevant facts in exquisite detail. See Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328 (D. Mass. 2003) (Comfort IV); Comfort v. Lynn Sch. Comm., 150 F. Supp. 2d 285 (D. Mass. 2001) (Comfort III); Comfort v. Lynn Sch. Comm., 131 F. Supp. 2d 253 (D. Mass. 2001) (Comfort II); Comfort v. Lynn Sch. Comm., 100 F. Supp. 2d 57 (D. Mass. 2000) (Comfort I). We rehearse only those facts necessary to put this appeal into proper perspective.

We begin with a brief overview of the historical antecedents of the Lynn Plan. We then limn the contours of the Plan and describe how it operates on the ground. Next, we explore the Massachusetts racial imbalance law and its relation to the Lynn Plan. Finally, we trace the evolution of the instant litigation.

A. Historical Antecedents.

The district court made a series of findings, largely unchallenged, regarding the experiential predicate for the Lynn Plan. Comfort IV, 283 F. Supp. 2d at 344-47. We provide a brief synopsis.

Lynn is the ninth largest city in Massachusetts, with a population of approximately 89,000. At all times relevant hereto, its school system has followed a neighborhood-school-centered paradigm, that entitles pupils to attend their local schools as a matter of right. By the mid-1970s, several of Lynn's schools were experiencing significant racial imbalance. In 1977, for example, the Washington Community Elementary School had a non-white student population of 57% (more than six times the non-white percentage in the school system as a whole). Predominantly minority schools suffered disproportionately from resource shortages, overcrowding, discipline problems, and teacher apathy.

There were also indications of a high degree of racial tension throughout the system.

In an effort to combat these problems, Lynn established its first magnet school in 1979. At the same time, it inaugurated a voluntary transfer program aimed at attracting white students to that school (which apparently was located in a predominantly nonwhite area). The magnet program grew in fits and starts. It produced only modest success in alleviating racial imbalance.

In the meantime, demographics were shifting. Between 1980 and 2000, Lynn was transformed from 93% white to 63% white, with the school-age population outpacing the trend (that population had become more than half non-white by 2000). In the same time frame, the city became more racially segregated; increasingly, whites clustered in the northern and western areas and non-whites populated the south central region.

These residential patterns heightened the racial imbalance of Lynn's schools. By 1987, seven of eighteen elementary schools had white enrollments of 90% or more. Four others had predominantly non-white student bodies. Lynn responded by developing a plan to launch ten magnet schools,[1] but municipal leaders remained concerned that the magnet school program, on its own, would not suffice to combat growing racial imbalance. In September of 1989, the School Committee announced a

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[1] This plan was aspirational, and the total number of magnet schools in Lynn has yet to reach the target figure. In all events, Lynn's use of the term "magnet school" differs from the conventional definition of that term. Ordinarily, the term denotes an elite public school with competitive admissions policies. In Lynn's lexicon, however, the term refers to a school that features an educational theme beyond the standard scholastic curriculum, designed partially to entice cross-neighborhood transfers. Despite this specialization, however, the parties have stipulated that "the education provided . . . in each of the elementary, middle, and high schools in Lynn is comparable in quality, resources, and curriculum."

new approach: the Lynn Plan. That plan, as amended in 1990 and again in 1999, is described below.

B. The Lynn Plan.

The defendants describe the Lynn Plan as a voluntary plan for school improvement and the elimination of minority isolation. Its school assignment provisions revolve around the time-honored concept of neighborhood schools. Under that concept, each pupil is guaranteed an assignment to his or her neighborhood school. Race is taken into account only when a student seeks to transfer (or to be assigned) to a school other than his or her neighborhood school.

Lynn operates eighteen elementary schools (six of which are magnet schools), four middle schools (three of which have magnet programs), and three high schools.[2] In the 2001-2002 school year, 15,444 students attended the Lynn public schools. Out of this group, approximately 42% were white, 15% Black/African-American, 29% Hispanic, and 14% Asian (for a total "minority" population of roughly 58%).

For purposes of the Lynn Plan, schools are placed in one of three categories. A "racially balanced" school is one in which the percentage of minority students (defined by Lynn to include Black/African-Americans, Hispanics, Asians and Native Americans) falls within a set range of the overall proportion of minorities in Lynn's student population. The range is plus or minus 15% for elementary schools and plus or minus 10% for other schools. To illustrate, an elementary school enrolling between 43% and 73% minority students during the 2001-2002 school year was considered racially balanced. So too was a middle school or high school that had a minority enrollment of 48% to 68%. In that school year, nine of

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[2] In addition, Lynn operates six alternative schools, offering such things as special needs and vocational training. Because these additional schools are not subject to the transfer provisions of the Lynn Plan, we abjure any further mention of them.

Lynn's elementary schools and one of its middle schools were racially balanced. All three high schools qualified under that rubric.

If a school falls below the target range (i.e., if the percentage of minority students in 2001-2002 fell below 43% for an elementary school or 48% for a middle or high school), it is considered "racially isolated." Conversely, a school whose minority representation rose above the target range (i.e., over 73% for an elementary school or 68% for a middle or high school) is deemed to be "racially imbalanced." In 2001-2002, five of Lynn's elementary schools and one of its middle schools fit the racially isolated mold, whereas four elementary schools and two middle schools were racially imbalanced.

The basic mechanism of the transfer policy is simple. Subject to certain exceptions, a white student desirous of transferring may not transfer to a school with a higher percentage of white students than his or her neighborhood school. Similarly, a minority student may not transfer to a school with a higher percentage of minority students than his or her neighborhood school. Lynn prohibits such transfers because it regards them as "segregative." Conversely, transfers that Lynn regards as "desegregative" are generally allowed (indeed, encouraged). These are transfers of white students to schools with lower percentages of white students and transfers of non-white students to schools with lower percentages of non-white students. Finally, any student whose assigned neighborhood school is racially balanced can transfer to another racially balanced school without regard to whether the transfer is segregative or desegregative.

Two exceptions are worth noting. First, any student who qualifies as "multi-racial" is not subject to the described limitations on transfer. Second, transfers will be allowed unreservedly in order to unite students with siblings attending non-neighborhood schools.

Despite the exceptions, the Lynn Plan opens the door to unequal treatment based on race. Take, for example,

the following not-so-hypothetical scenario. Two youngsters, one white, one African-American, are initially assigned to the same neighborhood elementary school for school year 2001-2002. The school is racially isolated (its census of minority pupils is less than 43% of the total student body). Both children ask to attend a nearby school that is racially imbalanced (its non-white population is above 73%). The white student will be permitted to transfer; the African-American student will not.

To be sure, those whose transfer requests are denied for reasons of race are entitled to appeal. Common grounds for successful appeals include medical and safety concerns, daycare issues, and other types of hardship. The record indicates that roughly half of all appeals are successful. Moreover, the transfer policy is only part of the Lynn Plan, which includes significant curricular innovations designed to foster cross-racial understanding. The Plan also envisions a construction program designed to improve the condition of facilities, alleviate overcrowding, and make space available for desegregative transfers.

C. The Racial Imbalance Law.

The racial imbalance law (the RIL), Mass. Gen. Laws ch.15, §§ 1I, 1J, 1K, ch. 71, §§ 37C, 37D (1965), directs the Board of Education, a state agency, to remedy de facto segregation in the public schools throughout the Commonwealth. See Sch. Comm. v. Bd. of Educ., 227 N.E.2d 729, 732 (Mass. 1967). The legislature enacted the RIL in response to findings that racial imbalance had reached dramatic levels in the public schools and threatened to harm students' educational opportunities. See id. at 733-34. The RIL prescribes two main anodynes: first, it authorizes the Board to fund voluntary efforts to improve racial balance, Mass. Gen. Laws ch. 15, § 1I; second, it empowers the Board to compel school districts to adopt integration plans in certain circumstances, id.

ch. 71,§ 37D, or, alternatively, to impose mandatory plans upon recalcitrant districts, id. ch. 15, § 1I.

Since the passage of the RIL, the Lynn school system has received significant state aid for its voluntary efforts to combat racial imbalance. These funds have helped pay for new construction and school renovations.[3] Moreover, Lynn is paid a state stipend of $500 for each and every desegregative student transfer. Finally, the Commonwealth, pursuant to the RIL, defrays certain costs associated with cross-neighborhood transportation and the establishment of magnet schools.

D. Travel of the Case.

In 1999, parents of children who had been denied transfers under the Lynn Plan (the Comfort plaintiffs) brought a civil action against the Lynn School Committee, its individual members, and several municipal hierarchs. They claimed that the Lynn Plan, and by implication the RIL, violated the Equal Protection Clause, several federal civil rights statutes (including 42 U.S.C. § 1983), and Article 111 of the Massachusetts Declaration of Rights. The Commonwealth intervened as a party defendant for the limited purpose of defending the constitutionality of the RIL. See 28 U.S.C. § 2403(b). The district court denied a motion to enjoin preliminarily the use of racial classifications in the Lynn Plan. Comfort I, 100 F. Supp. 2d at 59-60. Even though the plaintiffs suffered some setbacks in the course of serial rulings on motions to dismiss, see, e.g., Comfort III, 150 F. Supp. 2d at 289, 296-97, 302; Comfort II, 131 F. Supp. 2d at 254, 256, the case survived. Other parents (the Bollen plaintiffs) filed a second action. Their complaint stated roughly the same set of claims, but added as official

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[3] Prior to 2001, the RIL provided reimbursement for school construction and renovations undertaken for the purpose of reducing racial imbalance. The current iteration of the law no longer provides such incentives. See Mass. Gen. Laws ch. 15, § 1I; see also Comfort IV, 283 F. Supp. 2d at 344.

capacity defendants the members of the Board of Education. The district court consolidated the two cases.

An eleven-day bench trial ensued. In a lengthy opinion, the district court dismissed a number of the Bollen plaintiffs' claims on standing grounds. Comfort IV, 285 F. Supp. 2d at 361-63. It then rebuffed the facial attack on the RIL, id. at 366-68, and determined that the transfer provisions of the Lynn Plan passed constitutional muster as a narrowly tailored response to several compelling state interests, id. at 375-92. The court proceeded to reject the plaintiffs' federal statutory claims, finding the prophylaxis of those statutes coextensive with that of the Equal Protection Clause. Id. at 392-93. Finally, the court held that the transfer provisions of the Lynn Plan did not violate Article 111 of the Massachusetts Declaration of Rights. Id. at 393-400.

This appeal followed. Unlike the district court, we have had the benefit of the Supreme Court's decisions in Grutter and Gratz. Applying the teachings of these opinions to this plethoric record and affording careful consideration to the extensive briefing submitted both by the parties and by a host of able amici, we now invalidate the transfer provisions of the Lynn Plan.

II. STANDING

"[T]he general rule is that a court should first confirm the existence of rudiments such as jurisdiction and standing before tackling the merits of a controverted case." Berner v. Delahanty, 129 F.3d 20, 23 (1st Cir. 1997). This is because "standing is a necessary concomitant to the court's power to adjudicate a case." R.I. Ass'n of Realtors v. Whitehouse, 199 F.3d 26, 30 (1st Cir. 1999). Thus, we pause at the outset to consider the plaintiffs' standing.

In order to achieve standing, a party seeking to invoke federal jurisdiction must demonstrate three things:

> First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected

> interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and internal quotation marks omitted). Here, the plaintiffs launch two separate challenges: they seek both an injunction against further application of the allegedly discriminatory portions of the Lynn Plan and a declaration that the RIL is unconstitutional on its face. Under prevailing precedents, the plaintiffs must demonstrate that they have standing to obtain each form of relief sought. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000).

With respect to the Lynn Plan, one plaintiff (Gina Leone) plainly meets the threshold standing requirement. Leone sues on behalf of her minor son, Troy Lamothe. The record indicates that in March of 2000, Troy sought to transfer from his neighborhood school. The school system denied the request on the ground that the proposed transfer would be segregative. Although Troy was allowed to attend the school of his choice pendente lite, standing is manifest. See Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 n.3 (1st Cir. 1995) (accepting plaintiff's standing despite defendant's agreement not to enforce disputed ordinance pending outcome of litigation).

That ends this aspect of the matter. So long as one plaintiff has standing to press for a particular form of global relief (here, declaratory and injunctive relief against the race-conscious transfer provisions of the Lynn

Plan), an inquiring court need not address the standing of other plaintiffs seeking that relief. See Watt v. Energy Action Educ. Found., 454 U.S. 151, 160 (1981); Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 183 (1st Cir. 1999).

Standing with respect to prospective injunctive or declaratory relief against the RIL is a horse of a different hue. The parties stipulated, and the district court confirmed, that the portion of the RIL dealing with mandates for the reduction of racial imbalance has not been applied in Lynn. Comfort IV, 283 F. Supp. 2d at 367. Notwithstanding this lack of imbrication, the plaintiffs attempt to mount a facial attack on those mandatory provisions. The plaintiffs say that those mandates, codified at Mass. Gen. Laws ch. 71, § 37D, give white children a right to transfer out of isolated schools and minority children a right to transfer out of imbalanced schools — rights that are denied to minority children in isolated schools and to white children in imbalanced schools. Appellants' Br. at 56. Even if that is so in theory, only a person who was denied a transfer on the basis of those provisions has standing to challenge them. The plaintiffs cannot overcome this obstacle. We explain briefly.

The mandatory provisions of section 37D apply only to recalcitrant school districts, that is, to communities that eschew voluntary action to combat identified racial imbalance. Sch. Comm. of Springfield v. Bd. of Educ., 319 N.E.2d 427, 429 (Mass. 1974). Lynn took a proactive stance: it drafted and implemented a voluntary plan — and it is the terms of that plan, not the strictures of the RIL, which curtail the plaintiffs' transfer rights. Thus, the plaintiffs have sustained no cognizable injury from the mandatory provisions of the RIL.[4] Accordingly, the

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[4] We add that the plaintiffs have not shown that they are under any imminent threat of being subjected to these mandates. That possibility will depend, in large part, upon Lynn's response to this decision.

plaintiffs lack standing to seek a declaration anent their validity.

The plaintiffs also lack standing to seek prospective injunctive or declaratory relief against those portions of the RIL that encourage — but do not command — the creation of voluntary plans to combat racial imbalance. Redressability is a prerequisite for standing, see N.H. Right to Life PAC v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996), and it requires a substantial likelihood that the sought-after relief will in fact palliate the alleged injury. Bonas v. Town of N. Smithfield, 265 F.3d 69, 73 n.4 (1st Cir. 2001); Am. Postal Workers Union v. Frank, 968 F.2d 1373, 1376-77 (1st Cir. 1992). In this instance, the plaintiffs describe their alleged injury as both a racially-based denial of transfers and a stigmatic harm stemming from their inability to "compete" on equal terms for transfers. Even assuming for argument's sake that this asserted injury is traceable in some way to the RIL, the plaintiffs cannot show that their first form of requested relief — enjoining the Board of Education from insisting upon "racial balancing plans" as a condition of any financial assistance to local schools — will either pave the way for racially unrestricted transfers within the Lynn public schools or eliminate the perceived stigmatic harm.

To illustrate the point, one need only look at the record. Under the grandfathered terms of the pre-2001 RIL, see supra note 3 and accompanying text, Lynn does receive state funding for construction and busing based on its voluntary efforts to combat racial imbalance. Even so, were we to grant the requested relief and direct the Board to allocate financial assistance without regard to racial balancing efforts, redress would not necessarily follow. There is simply no reason to believe that Lynn would cancel its transfer program merely because it could receive state subsidies without it.

In an effort to parry this thrust, the plaintiffs and their amicus present a second theory for prospective relief. They posit that the RIL is the de facto cause of their injury in that it effectively coerces school districts

into adopting discriminatory racial balancing schemes (and for that reason is unconstitutional). If this were true, declaratory relief would clearly redress their harm. See N.H. Right to Life PAC, 99 F.3d at 13.

The difficulty is that the "voluntary plan" provisions of the RIL comprise a declaration of a policy goal to fight de facto segregation, see Mass. Gen. Laws ch. 71, §37C, coupled with a pledge of financial aid to help schools achieve it, id. ch. 15, §1I. Those provisions do not dictate a procedure or methodology that communities must use in order to achieve this goal. The plaintiffs would need to show that the aspirational provisions of the RIL are causally responsible for a school district's institution of an unconstitutional racial classification. The plaintiffs have made no such showing in the case at hand.

What is more, even if such a causal link could be forged, none of the plaintiffs seeking to overturn the RIL could credibly claim that the RIL threatened to cause him or her the predictable future harm necessary for prospective relief. The voluntary provisions of the RIL — the only provisions that arguably apply to Lynn at this point in time — contain no requirement that school systems employ racially restrictive transfer methods (or any other particular methods, for that matter). Comfort IV, 283 F. Supp. 2d at 342 n.25. Unlike the affirmative action context, in which set-asides for minority applicants place all non-minorities at a competitive disadvantage, the goal of non-competitive racial balancing does not predictably cause one racial group as opposed to another to be burdened. The plaintiffs can only speculate, then, that any possible future plan that may be conceived under the auspices of the RIL's voluntary provisions will harm them based on their race. Such rank speculation does not rise to the level of an Article III case or controversy, and the fact that past damage occurred due to the prior misuse of a discredited policy does not abate the speculation. See City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983).

In other words, unless and until Lynn adopts a specific methodology for achieving the goals suggested by the RIL, the plaintiffs will not be able to show that they are under an imminent threat of injury "that affects [them] in a personal and individual way." Lujan, 540 at 561 n.1. Accordingly, the plaintiffs do not have standing to challenge the aspirational provisions of the RIL.[5]

III. EQUAL PROTECTION

The main issue on appeal concerns the constitutionality of the use of race to restrict a student's ability to transfer to a non-neighborhood public school. The plaintiffs contend that by mechanically taking race into account, the Lynn Plan runs afoul of the Equal Protection Clause and various federal statutes (including 42 U.S.C. § 1983 and Title VI). The resolution of the section 1983 and Title VI claims depends on the fate of the constitutional challenge — and the successful pursuit of that challenge, see text infra, moots the remaining federal statutory claims (both in the traditional sense and in the sense that they have been presented to this court without sufficiently developed argumentation). Consequently, we shape our analysis in terms of the equal protection issue.

A. Standard of Review.

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[5] We add that, even if the plaintiffs had shown standing, we largely agree with the district court that a facial challenge to the RIL must fail. Comfort IV, 283 F. Supp. 2d at 367-68. After all, "[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). It cannot be disputed that such circumstances exist here. See Boston's Children First v. Boston Sch. Comm., 260 F. Supp. 2d 318, 327 (D. Mass. 2003) (finding that the goals espoused by the RIL may be satisfied by race-neutral methods), aff'd sub nom. Anderson v. City of Boston, 375 F.3d 71 (1st Cir. 2004).

This appeal comes to us at the conclusion of a bench trial. Consequently, we accord deferential review to the court's findings of fact and plenary review to its legal conclusions. Wessmann v. Gittens, 160 F.3d 790, 795 (1st Cir. 1998). The latter standard applies where, as here, we deal with questions of whether the facts, as found, justify the court's legal conclusions. Id.

B. Level of Scrutiny.

The Equal Protection Clause commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. By its terms, the Equal Protection Clause applies to persons, not groups. See Shelley v. Kraemer, 334 U.S. 1, 22 (1948). It follows that whenever a state or local government takes an action based on race — a particularly irrelevant and generally prohibited type of group classification — it is the courts' role to ensure that an individual's personal right to equal protection has not been infringed by that classification. Grutter, 539 U.S. at 326; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

The law is adamantine that all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny. Gratz, 539 U.S. at 270. This principle has particular bite because "[t]he Supreme Court consistently employs sweeping language to identify the species of racial classifications that require strict scrutiny." Wessmann, 160 F.3d at 794. Under the Lynn Plan, a student's race may be determinative of whether he or she can transfer to a given non-neighborhood school. Strict scrutiny is a natural fit for such a race-conscious regime. See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 377 F.3d 949, 960-61 (9th Cir. 2004) (applying strict scrutiny to factually similar school assignment plan).

Remarkably, the defendants and some of their amici strive to persuade us that we should apply a more relaxed level of scrutiny here. They cite cases such as Anderson v. City of Boston, 375 F.3d 71, 87-88 (1st Cir. 2004), and

Raso v. Lago, 135 F.3d 11, 16-17 (1st Cir. 1998), for the proposition that race-neutral diversity plans are not necessarily subject to strict scrutiny. Building on this foundation, they then posit that the Lynn Plan does not employ classifications preferring the interests of one race over those of another because (i) it affects whites and nonwhites equally, and (ii) given the parties' stipulation that all of Lynn's schools provide equivalent educational opportunities, the transfer policy imposes no unequal burden or benefit on anyone. We find these protests unavailing: the Lynn Plan is not race-neutral, and no amount of artful advocacy can change that fact.

As for the defendants' first point, burdening different groups equally does nothing to pull the constitutional sting from classifications based on race. See Loving v. Virginia, 388 U.S. 1, 8 (1967); Wessmann, 160 F.3d at 795 n.1. Similarly, the fact that the racial identity of the burdened party will change with the circumstances of a particular transfer does not alter the reality that, in each instance, "someone from some group will be benefited [sic] and a different someone from a different group will be burdened" through the explicit use of race. Wessmann, 160 F.3d at 794. This reality demands the application of strict scrutiny. See Gratz, 539 U.S. at 270.

As for the defendants' second point, we refuse to entertain the fiction that because all of Lynn's schools provide equivalent academic training, no person is benefitted or burdened by the preferential handling of transfer requests. The Court made it pellucid a half-century ago that, in terms of public education, separate is never equal. See Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954). This is common sense: there are factors other than academic quality that often influence a student's preference to attend a particular school. This reality is amply demonstrated by the fact that parents (the plaintiffs in these cases are exemplars) find one school so far preferable to another that they elect to forfeit the convenience of neighborhood schooling in search of a better, albeit more distant, education.

We conclude, therefore, that the Lynn Plan must be subjected to strict scrutiny. Under that standard, "[racial] classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." Grutter, 539 U.S. at 326. To facilitate this inquiry, the law assigns the proponents of race-based classifications the burden of demonstrating that the strict scrutiny standard is satisfied. Gratz, 539 U.S. at 270.

While it is exacting, strict scrutiny is not a mandatory death sentence for a race-conscious policy. Grutter, 539 U.S. at 326; Adarand, 515 U.S. at 237. "When race-based action is necessary to further a compelling government interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." Grutter, 539 U.S. at 327.

We add, moreover, that strict scrutiny is not blind to context. That type of inquiry "is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." Id. (emphasis supplied). Bearing this in mind, courts must judge racial classifications in light of the situations in which they arise. Wessmann, 160 F.3d at 796. Consequently, to determine whether a particular racial classification offends the equal protection guarantee, a reviewing court must factor any and all relevant contextual considerations into the decisional calculus. Adarand, 515 U.S. at 228.

C. Compelling State Interest.

Against this backdrop, we turn to the existence vel non of a compelling state interest. We begin this phase of our analysis with a close look at the Grutter Court's pronouncements about what constitutes a compelling interest in the educational context.

To understand Grutter, we must retreat to Justice Powell's opinion in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). That opinion, decisive in the case,

indicated that, wholly apart from any remedial considerations, a university's interest in a diverse student body might, in some circumstances, rise to the level of a compelling state interest. Id. at 311-12, 320 (opinion of Powell, J.). The Supreme Court's statements over the next fifteen years did little to reinforce the view that diversity could be a sufficiently compelling interest outside the remedial context. See, e.g., Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality op.); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality op.). Grutter supplied the missing reinforcement, holding that a law school's interest in obtaining the educational benefits that flow from having a diverse student body was compelling enough to justify the narrowly tailored use of race in admissions. Grutter, 539 U.S. at 343.

Identifying precisely the compelling interest sanctioned in Grutter is easier said than done. Grutter involved law school admissions. The defendant took into account an applicant's racial and ethnic background as one of several "soft variables" used in assessing that applicant's prospects for admission. Id. at 315. The school justified this strategy as furthering its stated goal of assembling a class that was both "exceptionally . . . qualified and broadly diverse." Id. at 329. A subsidiary goal was to enroll a "critical mass" of minority students and, thus, enhance the law school's quest for broad diversity. Id.

The Grutter Court took pains to clarify that the law school's plan did not pursue a critical mass of minority students for its own sake, but, rather, for the sake of the educational benefits that flow from having a diverse student body. Id. at 329-30 (acknowledging that racial balancing, for its own sake, is patently unconstitutional). These educational benefits included promoting cross-racial understanding, breaking down stereotypes, creating livelier and better informed class discussions, and preparing students to succeed in an increasingly diverse society. Id. at 330.

The Grutter Court largely deferred to the law school's educational judgment not only in determining that diversity would yield these educational benefits, but also in determining that these benefits were critical to the school's educational mission. Id. at 328-33. The Court seemed to take comfort in the fact that the law school's conclusions were bolstered by expert evidence. Id. at 330. Justice O'Connor warned, however, that the Court's "scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university." Id. at 328.

The Grutter Court concluded that the quest for these benefits comprised a compelling state interest. Id. In so ruling, the Court acknowledged "the overriding importance of preparing students for work and citizenship . . . as pivotal to sustaining our political and cultural heritage." Id. at 331 (citation and internal quotation marks omitted). In a comment that seems particularly pertinent to the university context, the Court emphasized "that the path to leadership [must] be visibly open to talented and qualified individuals of every race and ethnicity" so that our nation's leaders will have "legitimacy in the eyes of the citizenry." Id. at 332.

With this foundation in place, we mull the stated interest that Lynn seeks to achieve through use of racial classifications. This is not a case where the racial classification is aimed at remedying past segregation. Comfort IV, 283 F. Supp. 2d at 390 n.101. Rather, the parties stipulated that Lynn's interests

> include fostering integrated public schools and what Lynn believes are its positive effects; reducing minority isolation and avoiding segregation and what Lynn believes are their negative effects; promoting a positive racial climate at schools and a safe and healthy school environment; fostering a cohesive and tolerant community in Lynn; promoting diversity;

ensuring equal education and life opportunities and increasing the quality of education for all students.

At first blush, Lynn's avowed interests appear to fall into two distinct categories: (i) reaping the educational benefits that flow from having a racially diverse student body in each of its public schools, and (ii) avoiding the negative educational consequences that attend racial isolation. Closer inspection shows these interests to be two sides of the same coin.

In advocating the importance of racial diversity in its schools, Lynn maintains that ensuring a racially diverse student body has produced, and will continue to yield, benefits central to its educational mission. These benefits include many of the same benefits cited by the Grutter Court: disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial world. To some extent, Lynn has history on its side. Since the inception of the Lynn Plan, the school system has experienced many positive changes, such as higher attendance rates, declining suspension rates, a safer environment, and apparent academic gains.

All of these benefits can be explained, in the defendants' view, by two related theories. The first is an intergroup contact theory, which posits that "under certain conditions, interaction between students of different races promotes empathy, understanding, positive racial attitudes and the disarming of stereotypes." Comfort IV, 283 F. Supp. 2d at 356. The second is a critical mass theory, which posits that "unless there is a 'critical mass' of white and nonwhite students in a given school," it will be difficult to obtain the benefits envisioned by intergroup contact. Id. at 357. Citing these theoretical underpinnings, the district court gave credence to the defendants' assertion of a causal link between improvements in the school system and increased racial balance. Id. at 354.

Lynn's second claimed compelling interest — avoiding the damaging educational effects of racial isolation in its schools — is largely an inverse restatement of the first. See Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 130 (4th Cir. 1999); Brewer v. W. Irondequoit Cent. Sch. Dist., 32 F. Supp. 2d 619, 627 (W.D.N.Y. 1999). According to the defendants, the Lynn Plan aspires to reduce or eliminate the number of schools which, as a result of residential segregation, enroll a significantly outnumbered racial minority population. The defendants' expert evidence suggests that racially isolated students often feel psychological burdens that can lead to poor attendance and parlous academic performance.

When all is said and done, these two interests collapse into one. Whether stated as achieving the benefits of intergroup contact and critical mass or avoiding the pitfalls of racial isolation, the central idea is that students — all students — are better off in racially diverse schools. We therefore restate the interest at stake here as obtaining the educational benefits of a racially diverse student body.

A short time ago, we expressly reserved the question whether the need for racial diversity alone might, under certain circumstances, constitute a compelling governmental interest sufficient to warrant some type of race-conscious action.[6] See Wessmann, 160 F.2d at 798. The Lynn Plan poses that reserved question.

At trial, the defendants presented considerable evidence of both educational and environmental gains (e.g., improved achievement test scores, decreased racial tension). The plaintiffs do not gainsay that progress, but, rather, question whether these advancements fairly can be attributed to the race-conscious elements of the Lynn Plan. The plaintiffs variously contend that the Supreme

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[6] Grutter did not explicitly resolve the question, referring instead to the compelling interest in obtaining the benefits that accrue from a diverse student body. 539 U.S. at 328. Racial diversity is a subset of that broader diversity.

Court has foreclosed the possibility that obtaining educational benefits from racial diversity can ever constitute a compelling state interest; that increased academic achievement and racial harmony can be explained by other, race-neutral aspects of the Lynn Plan (e.g., new facilities, greater economic resources, curriculum changes, and teacher training); that the defendants offered no relevant statistical analyses; and that, in all events, any connection between racial balance and educational benefit is belied by the fact that, as the parties have stipulated, the quality of education is comparable throughout Lynn's schools (even those deemed racially isolated or imbalanced). Upon careful examination, we find these contentions unpersuasive.

To begin, we acknowledge that the Lynn Plan's transfer mechanism expressly aims at attaining a racial balance in the city's schools, and the Court frequently has warned that racial balancing, for its own sake, can never survive strict scrutiny. See, e.g., Grutter, 539 U.S. at 330; Freeman v. Pitts, 503 U.S. 467, 494 (1992). Still, we reject the idea that obtaining educational benefits from racial diversity can never constitute a compelling state interest. Where a community does not seek racial balance for its own sake but for the sake of the educational benefits that diversity plausibly may provide, there is no absolute bar. See Grutter, 539 U.S. at 330. The district court found that this was Lynn's purpose, Comfort IV, 283 F. Supp. 2d at 375-76, and the record supports that finding. We see no reason to second-guess it. Cf. Grutter, 539 U.S. at 328 (stating that, typically, an "educational judgment that . . . diversity is essential to its educational mission is one to which we defer").

It is a closer question whether the defendants have proven that racial diversity is compelling in the K-12 context. On one hand, the educational improvements that Lynn has experienced are consistent with the social science testimony offered in support of the Plan. The parties' stipulation that "the education provided . . . in each of the elementary, middle, and high schools in Lynn

is comparable in quality, resources, and curriculum" does not negate the possibility that racial diversity has produced some of these gains. On the other hand, the question lingers as to whether the dearth of evidence explicitly linking educational advancements to improved racial balance is fatal. See Wessmann, 160 F.3d at 805 (discussing a party's failure to eliminate non-racial variables in evaluating the necessity of a race-conscious policy). The tiebreaker, as we see it, is that the interests asserted bear a strong familial resemblance to those that the Grutter Court found compelling. There is no reason to believe that these interests are substantially more potent in the context of higher education than in the context of elementary and secondary education.[7] See Parents Involved, 377 F.3d at 964; cf. Plyler v. Doe, 457 U.S. 202, 221 (1982) (emphasizing the importance of K-12 education "in maintaining the fabric of our society").

In the last analysis, we agree with Judge O'Scannlain that, "[a]t bottom, Grutter plainly accepts that constitutionally compelling internal educational and external societal benefits flow from the presence of racial and ethnic diversity in educational institutions." Parents Involved, 377 F.3d at 964. Though the benefits attributed to the Lynn Plan do not mimic exactly the benefits described in Grutter, one important lesson of Grutter is that the compelling state interest in diversity should be judged in relation to the educational benefits that it seeks to produce. 539 U.S. at 330. The Lynn Plan's use of race aspires to create many of the same benefits that were cited approvingly by the Grutter Court, including breaking down racial barriers, promoting cross-racial

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[7] In point of fact, there was significant evidence presented at trial supporting the view that the benefits to be derived from a racially diverse educational milieu are more compelling at younger ages. See, e.g., Comfort IV, 283 F. Supp. 2d at 356 (summarizing expert's testimony to the effect that "[i]t is more difficult to teach racial tolerance to college-age students; the time to do it is when the students are still young, before they are locked into racialized thinking").

understanding, and the umbrella notion of preparing students for a world in which "race unfortunately still matters." Id. at 333. While Lynn adds benefits not contemplated in Grutter (e.g., student safety and attendance) and downplays the advantages of viewpoint diversity in the classroom — a benefit heralded in Grutter, id. at 330 — these differences seem to be the logical result of context. It is natural to presume that safety and attendance issues will loom larger in elementary and secondary schools as opposed to graduate schools and, conversely, that lively classroom discussion is a more prominent form of learning in law schools (which generally prefer the Socratic method) than in a K-12 setting.

The short of it is that the defendants have made a persuasive case that a public school system has a compelling interest in obtaining the educational benefits that flow from a racially diverse student body. Accord Parents Involved, 377 F.3d at 964; Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 753 (2d Cir. 2000). We so hold.

D. Narrow Tailoring.

Even when the use of racial distinctions is permissible to advance a compelling governmental interest, the government's use of such distinctions must be sculpted to fit the permitted purpose. Grutter, 539 U.S. at 333. Insisting on a close fit between means and end not only ensures that the use of race is no broader than necessary to achieve the government's legitimate interests, but also enables courts to flush out those racial classifications that are constitutionally impermissible. Gratz, 539 U.S. at 270.

This component of the equal protection analysis is known as the narrow-tailoring requirement. Stated generally, narrow tailoring demands that the proponent show that the chosen plan or practice is (i) necessary to the declared purpose, (ii) proportional to that purpose, (iii) limited in time, and (iv) not productive of a greater

than necessary burden on third parties. See United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality op.). This is, however, the view from 50,000 feet — and at that level of generality the formulation is of limited value. With that in mind, the Supreme Court repeatedly has reminded us that the narrow-tailoring inquiry is case-specific; it "must be calibrated to fit the distinct issues raised by the use of race" in a given context. Grutter, 539 U.S. at 333-34. Thus, the factors used to judge whether a particular plan or practice is narrowly tailored will depend, in the first instance, on the nature of the compelling interest that the government seeks to further.

The Court has not yet considered a constitutional attack on a race-based transfer policy for elementary and secondary schools. Nevertheless, the recent opinions in Grutter and Gratz "define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs," Grutter, 539 U.S. at 333, and thus furnish some relevant guideposts for how the narrow-tailoring inquiry should function where the State's professed interest is achievement of diversity in the K-12 setting.

Gratz involved the University of Michigan's undergraduate admissions program. The University automatically assigned 20 points — one-fifth of the 100 points needed to guarantee admission — to an applicant from an underrepresented racial or ethnic minority group. Gratz, 539 U.S. at 255. This 20-point bonus effectively made race/ethnicity determinative for minimally qualified minority applicants. Id. at 272.

Grutter involved law school admissions. The law school took race into account as one of several variables in an individual's application. Grutter, 539 U.S. at 340. The school assigned no mechanical score based on an applicant's race; instead, it considered race only as one of several possible ways in which an applicant could enrich the diversity of the student body. Id. at 315-16. Moreover, the law school set no quotas for racial or ethnic minorities. Id. at 335-38.

The Supreme Court struck down the plan used in Gratz while upholding the one used in Grutter. In arriving at these decisions, the Court delineated how to calibrate the narrow-tailoring inquiry. First, a race-conscious admissions program must use race in "a flexible, non-mechanical way" if its plan is to be considered narrowly tailored. The plan cannot institutionalize a quota system or in any way insulate one category of applicants from competition with another solely on account of race. Id.; Gratz, 539 U.S. at 258, 270-72. Race can, however, be used as a plus factor in the course of an individualized consideration of each applicant. Grutter, 539 U.S. at 334. Second, the Court chanted a familiar mantra: that government must consider, as a preferred option, workable, race-neutral alternatives that hold out the promise of achieving the compelling interest that prompts a particular plan or practice. Id. at 339. Third, narrow tailoring "requires that a race-conscious admissions program not unduly harm members of any racial group." Id. at 341. Fourth, the use of racial distinctions must be limited in time. Id. at 342. In the university context, "the durational requirement can be met by sunset provisions . . . and periodic reviews to determine whether racial preferences are still necessary." Id.

If we were to import into this case the Court's first narrow-tailoring requirement, the Lynn Plan could not survive strict scrutiny. See Parents Involved, 377 F.3d at 969. The Lynn Plan explicitly hinges the availability of a transfer on a student's race. There is no individualized consideration of a student's qualifications, no head-to-head comparison of one student to another, and no weight given to a student's other potential contributions to diversity. Apart from an appeals process that allows exceptions only for hardship or other special circumstances, race generally determines the fate of a student's application to transfer to a non-neighborhood school. So viewed, the Lynn Plan is even more mechanical

and even less flexible than the collegiate admissions policy that the Gratz Court found wanting.[8]

Still and all, we hesitate to stop at that point because transplanting the first narrow-tailoring requirement root and branch from Grutter and Gratz would ignore the Court's admonition that context matters. It is conceivable that a nuanced comparison between the context of competitive collegiate or graduate school admissions and non-competitive primary or secondary school transfers may show that a mechanical consideration of race in the latter context should not be treated as the shibboleth that it is in the former. We essay that comparison.

In the admissions context, the Supreme Court has catalogued several dangers flowing from the mechanical, inflexible, and exclusive use of race as a determinant. For one thing, such an approach insulates the preferred category of applicants from competition with other applicants. Grutter, 539 U.S. at 334. For another thing, such an approach feeds the stereotype that students from the preferred group lack merit, thus raising the specter of stigmatic harm. See Bakke, 438 U.S. at 298 (opinion of Powell, J.) (stating that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection"). These dangers are far less ominous, if not altogether absent, in the K-12 setting. In particular, the transfer provisions of the Lynn Plan do not operate competitively: "X" is granted or denied a transfer on the basis of a set (albeit race-conscious) standard, not on the basis of how he stacks up when compared to "Y." Thus, the provisions neither skew a competitive process nor substitute race as

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[8] It is no response to suggest, as have several amici, that the volume of applicants for transfer in Lynn, combined with the school system's limited resources, vitiates the need for individualized review. "[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system." Gratz, 539 U.S. at 275.

a proxy for an applicant's merit. It is also arguable that the denial of a transfer does not inhibit the would-be transferee's access to a limited public good. After all, the parties have stipulated that Lynn's schools are academically equivalent, and the Lynn Plan denies no child a scholastically comparable education.[9]

Competitive disadvantage and stigmatic harm are not, however, the only reasons behind the Supreme Court's disdain for quotas and other inflexible uses of race. The Court has recognized that such policies foster the unwarranted presumption that all members of a given racial group represent the same viewpoint. See Gratz, 539 U.S. at 271. Regardless of the burden imposed by a racial preference, the simple act of granting benefits based on a quota or mechanical use of race will breed cross-racial tension. See Croson, 488 U.S. at 493. Furthermore, when government indulges in the automatic and unflinching use of race in the bestowal of any benefit, that usage counteracts the ultimate goal of relegating racial distinctions to irrelevance. Id. at 495. The unbending use of race in the Lynn Plan heightens these dangers. See Parents Involved, 377 F.3d at 969-70.

Although the question is close, we conclude that the distinction between competitive admissions and non-competitive transfer programs is insufficient to justify us in disregarding the Supreme Court's recent guidance. While the Court has emphasized the importance of context in framing the narrow-tailoring inquiry, nothing in either Grutter or Gratz indicates a willingness to embrace mechanical, race-based programs in other corners of the educational world. If there is to be a retreat from the Supreme Court's blueprint, the Court itself must light the way.

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[9] This is not to say that an applicant who is denied a transfer suffers no harm. Rather, we are merely raising the possibility that the harm is different in scope and kind from that experienced in the competitive admissions setting.

The outcome here flows naturally from this determination. Although the Lynn Plan is not a pure quota system, it uses race mechanically both to deprive some individuals of a desired benefit and to grant the same benefit to others. Because the Lynn Plan makes race decisive and forgoes individualized consideration of transfer applications, it cannot be deemed narrowly tailored to the community's compelling interest in obtaining the educational benefits of diversity. Accord Parents Involved, 377 F.3d at 969-70; Eisenberg, 197 F.3d at 133; Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 707 (4th Cir. 1999).

Although we could end our analysis of the Lynn Plan at this point, we think it wise to point out that the Plan has other narrow-tailoring shortcomings. We briefly discuss these flaws.

Even a flexible use of race will fail narrow tailoring under the Grutter/Gratz test if it "unduly burden[s] individuals who are not members of the favored racial and ethnic groups." Grutter, 539 U.S. at 341 (citation and internal quotation marks omitted). Thus, racial classifications cannot be used more often than necessary to satisfy the compelling governmental interest that is at stake. See id. The Lynn Plan cannot pass muster in this respect.

At trial, the defendants' expert testimony was to the effect that intergroup contact between students of different races produces significant educational benefits, and that those benefits only accrue when a critical mass of minority and non-minority students exists in each school. Although these witnesses did not pinpoint any "magic number" sufficient to form a critical mass, they agreed that 20% is the figure most often cited in the relevant literature.

The plaintiffs argue persuasively that the Lynn Plan is not narrowly tailored to achieve the educational benefits of intergroup contact. The touchstone for gaining the benefits of intergroup contact is the assembly of a critical mass of minority and non-minority students in

each school. But the Lynn Plan is calibrated toward proportional representation rather than critical mass; it seeks to maintain within each school a racial mix within 10%-15% of the racial mix of the aggregate student population (depending on the level of school). Thus, because Lynn's overall non-white school-aged population is 58%, an elementary school with a 40% non-white enrollment qualifies as racially isolated even though that school contains a critical mass of both white and nonwhite students.

The district court's response to this apparent failing is that while critical mass is required for educational benefit, that benefit increases the closer a given school comes to racial balance (that is, to mirroring the racial makeup of the community). See Comfort IV, 283 F. Supp. 2d at 357 (stating that "gains occur along a continuum: as the racial composition of school populations creeps closer to balanced, racial stereotyping and tension is [sic] reduced and racial harmony and understanding increase[]"). This rationale exceeds the bounds of the School Committee's presented theory and, in the end, collapses of its own weight.

The compelling government interest that animates the Lynn Plan is the interest in attaining the educational benefits of a level of racial diversity commensurate with critical mass. The use of race-conscious elements must, therefore, be narrowly tailored toward accomplishing that goal — not some other, more grandiose goal. A narrowly tailored plan would attempt to assemble a sufficient number of minority and non-minority students in each school to enable intergroup contact (a number that the defendants and their experts have equated with critical mass). In the same vein, a narrowly tailored plan would deny transfers on racial grounds only when such transfers would tend to jeopardize that number (that is, to jeopardize critical mass).[10] The Lynn Plan does neither

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[10] This is not to say that such a plan must be tailored to the attainment of a critical mass of exactly 20%. Neither equal protection

of these things. Consider, for example, that for the 2001-02 school year, two of Lynn's elementary schools — Aborn (35%) and Hood (42%) — had minority populations substantially above the 20% necessary to achieve critical mass but below the 43% necessary to qualify as racially balanced. A minority student seeking to transfer from either of these institutions to a racially balanced school normally would be turned down, even though that transfer would not deprive either the transferor or transferee school of critical mass. A white student, on the other hand, would be allowed to make the move. By contrast, Lynn allows all transfers that do not imperil racial balance, even if particular transfers are segregative. For instance, minority students may freely transfer from Lincoln-Thomson (43% minority) to Ford (71% minority), because neither the transferor nor transferee school will be deprived of racial balance (as that term is defined by Lynn).

Using racial restrictions to achieve benefits otherwise absent is one thing; using those restrictions to edge closer to racial balance is quite another. Except where necessary to correct the effects of past constitutional violations — a situation not extant here — racial balancing is "antithetical to our constitutional jurisprudence." Wessmann, 160 F.3d at 799. On this record, the numbers tell the tale: the Lynn Plan is not narrowly tailored to achieve the municipal defendants' asserted diversity interests.

Under the Grutter/Gratz test, narrow tailoring also requires that those who would use race as a criterion first demonstrate that they have exhausted race-neutral alternatives. Grutter, 539 U.S. at 339-40; Wygant, 476 U.S. at 280 n.6. This does not require the proponents to

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nor critical mass are matters of scientific precision, and an otherwise proper plan could overshoot the number necessary for critical mass as long as the plan was crafted with a view toward attaining critical mass. Here, however, the plan is designed to achieve racial balance, not critical mass.

try every conceivable alternative prior to the implementation of a race-conscious plan; they may reject alternatives that are shown, on the record, to be unworkable or unpromising. Grutter, 539 U.S. at 339; Croson, 488 U.S. at 507-08; Paradise, 480 U.S. at 171. We find that the responsible parties here — the municipal defendants — have not carried this burden.

We give credit where credit is due: the municipal defendants did seriously consider, and plausibly reject, a number of race-neutral alternatives. These included (i) a no-transfer policy, see Comfort IV, 283 F. Supp. 2d at 387-88 (crediting evidence from a demographics expert that instituting such a policy would throw several elementary schools into racial imbalance); (ii) a policy of unrestricted transfers, see id. at 388 (crediting evidence that instituting such a policy would result in 500 to 800 segregative transfers per year); (iii) a redrawing of district lines, see id. at 387-88 (noting the impracticalities of such a reconfiguration); (iv) a regimen of forced busing, see id. at 347 (concluding that the problems attendant to forced busing, with all its historical baggage, justified Lynn's rejection of a "controlled choice" scheme); (v) a lottery system, see id. at 389 (finding that demographic and scheduling factors warranted dismissal of this concept); and (vi) a plan using socioeconomic status, rather than race, as a benchmark for allowing transfers, see id. at 389 n.100 (noting that transfers based exclusively on socioeconomic status would exacerbate existing racial imbalance).[11]

Notwithstanding these laudable efforts, it is equally clear that the process of consideration and rejection of these options was geared toward a goal of racial balance, and not toward a goal of ensuring a critical mass of

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[11] We note that the use of socioeconomic status instead of race would not trigger strict scrutiny. The sting of rejection based on having too much money "pales in comparison to the insult of rejecting an applicant solely because of the color of [one's] skin." Parents Involved, 377 F.3d at 972 n.26.

minority and non-minority students in each school. If Lynn decides to create another plan to alleviate the perceived problem of de facto segregation, it would do well to revisit these measures (or, at least, such of them as held promise) in terms of critical mass theory. Lynn should also take note of the successes of other Massachusetts communities in creating race-neutral plans and study whether those plans might work in Lynn. See, e.g., Anderson, 375 F.3d at 74 (1st Cir. 2004) (approving Boston's race-neutral plan for achieving diversity in the city's schools).

The Lynn Plan arguably has another flaw. In order to survive constitutional scrutiny on narrow-tailoring grounds, the use of race-based distinctions must be limited in time. Grutter, 539 U.S. at 342. This durational requirement stems from the reality that a core purpose of the Fourteenth Amendment — to eradicate governmental discrimination based on race — sometimes necessitates the use of race as a temporary means to its accomplishment. See Croson, 488 U.S. at 497-98. Consequently, even when race-conscious plans are justified, educators should stand ready to replace them with race-neutral alternatives as new programs became available or as changing circumstances permit. Grutter, 539 U.S. at 342.

To this end, the Supreme Court, albeit in the context of higher education, has recommended that administrators consider sunset provisions in race-conscious policies and assiduously review such policies "to determine whether racial preferences are still necessary to achieve student body diversity." Id. We see no meaningful distinction between higher education and primary or secondary education when it comes to these criteria. Lynn falls short on this ground.

To be sure, the district court believed that the Lynn Plan had a "built-in" time-limiting mechanism because racially restrictive transfers to a particular school cease once that school is in line with the community's white-nonwhite ratios. Comfort IV, 283 F. Supp. 2d at 377. We

find this feature inadequate. Grutter posits that schools must periodically review the continued necessity of race-conscious measures and implement changes as and when race-neutral means become available. Id. at 342. So long as that review is maintained, a race-conscious plan may be somewhat open-ended. Id. at 343.

Here, however, the internal mechanism of the Lynn Plan is insufficient to take account of external changes in circumstances. The School Committee performs ongoing demographic monitoring, gathering data on the schools' racial composition, on transfers, and on the performance of the magnet schools. What the record does not indicate, though, is that the Committee has committed to undertake any manner of periodic review to determine whether ongoing developments might render the use of racial restrictions superfluous. Without that review, the mere compilation of statistics is not enough to satisfy the durational requirement. See Eisenberg, 197 F.3d at 132. Any narrowly tailored plan must include a commitment adequate to ensure that school officials afford periodic, serious, and good-faith consideration of the continued need for racial restrictions.

To summarize succinctly, the seas of strict scrutiny can be rough sailing. So it is here: for four reasons — the mechanical use of race, a design sculpted more to the achievement of racial balancing rather than to the educational benefits flowing from the attainment of critical mass, the failure fully to explore the feasibility of race-neutral alternatives, and the absence of a commitment to periodic review — we conclude that the Lynn Plan is not narrowly tailored to achieve the compelling governmental interest that spawned it in the first place.

That gets the grease from the goose. We hold that the transfer provisions of the Lynn Plan fail to survive the plaintiffs' equal protection challenge. We take no joy in this conclusion — the School Committee's motivations here were noble. Nevertheless, while we may empathize with the School Committee, this case aptly illustrates

what government at every level should know: charting a course that depends upon racial classifications is, in constitutional terms, a risky business.

This holding means, of course, that the plaintiffs must prevail on their section 1983 and Title VI claims.[12] We regard their other federal statutory claims as moot. So too is their claim that the Lynn Plan violates Article 111 of the Massachusetts Declaration of Rights. Consequently, we do not address any of the latter claims.

IV. RECUSAL

Despite our resolution of the central issue on appeal, we still must address the plaintiffs' claim that the district judge should have disqualified herself from hearing this case. The argument for recusal involves the following syllogism: (i) prior to her appointment to the federal bench, Judge Gertner was a member of the Lawyers' Committee for Civil Rights (LCCR), a nonprofit organization; (ii) LCCR is an advocacy group that unsuccessfully moved to intervene in this litigation on the side of the defendants; and therefore (iii) the law required that Judge Gertner recuse herself. Judge Gertner denied the recusal motion in an unpublished order dated March 21, 2002. We review that ruling for abuse of discretion. Camacho v. Autoridad de Telefonos, 868 F.2d 482, 490 (1st Cir. 1989).

The controlling statute is 28 U.S.C. § 455, which limns the applicable standards for recusal. That statute provides in pertinent part that a judge "shall" recuse herself "in any proceeding in which [her] impartiality might reasonably be questioned." Id. § 455(a). A party who suggests that recusal is appropriate must support the motion with facts that "provide what an objective,

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[12] We note that "[d]iscrimination that violates the Equal Protection Clause . . . committed by an institution that accepts federal funds also constitutes a violation of Title VI." Gratz, 539 U.S. at 276 n.23. It follows, then, that the denial of school transfers based on race violates both Title VI as well as section 1983.

knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality." In re: Boston's Children First, 244 F.3d 164, 167 (1st Cir. 2001) (quoting In re United States, 666 F.2d 690, 694 (1st Cir. 1981)). The plaintiffs have failed to cross this threshold.

Judges do not spring from Zeus's brow, bereft of any worldly contacts. To the contrary, every judge dons his or her robe with a lifetime of background experiences, a roster of acquaintances and associations, and a myriad of views. This past history, in and of itself, seldom is sufficient to require recusal. Brody v. President & Fellows of Harvard Coll., 664 F.2d 10, 11 (1st Cir. 1981) (per curiam). Unless there is a direct link sufficient to furnish a reasonable basis for doubting impartiality, the judge ought to continue to sit. In re United States, 158 F.3d 26, 31 (1st Cir. 1998); Blizard v. Frechette, 601 F.2d 1217, 1221 (1st Cir. 1979); cf. United States v. Giorgi, 840 F.2d 1022, 1035 (1st Cir. 1988) (explaining that unless a party can establish a reasonable factual basis to doubt a judge's impartiality "by some kind of probative evidence," then the "judge must hear a case as assigned") (emphasis in original) (internal quotation marks omitted).

These principles are dispositive here. LCCR is not a party to this case. Even if it were, Judge Gertner's relationship with that organization terminated upon her ascension to the bench on February 14, 1994. There is no allegation that she has maintained continuing ties with LCCR. Given the eight-year interval between the severing of the judge's connection with LCCR and the recusal motion, no reasonable attack on her impartiality can be mounted on that basis. Thus, recusal was not obligatory. See, e.g., Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1117 (4th Cir. 1988) (holding that an association with a nonprofit organization that ended a decade before adversary proceedings commenced does not form a reasonable basis for questioning the trial judge's impartiality even though the nonprofit was a party to the litigation); cf. Veneklase v. City of Fargo, 236 F.3d 899,

901 (8th Cir. 2000) (finding recusal unnecessary where judge's former law firm had represented parties tangentially involved in civil rights suit); United States v. Story, 716 F.2d 1088, 1090 (6th Cir. 1983) (finding recusal unnecessary where judge had represented victim in civil matter thirteen years earlier).

Contrary to the plaintiffs' importunings, our decision in Boston's Children First does not require a different result. There, we ordered recusal not because of the judge's past association with civil rights organizations but, rather, because the judge had made contemporaneous extrajudicial statements about a pending case. Boston's Children First, 244 F.3d at 169-70. Here, the judge's passing comment that LCCR was eligible to apply for amicus status is a far cry from the statements that engendered our ruling in Boston's Children First. That comment constitutes a wholly insufficient basis on which to order recusal.

To be sure, the plaintiffs lodge a claim of bias. On close examination, however, this is more cry than wool. The only indicium of bias to which they allude revolves around their perception of the judge's abstract policy preferences. That subjective apprehension, standing alone, is too weak a reed to warrant appellate interference with the district judge's recusal decision. Our judicial system would be paralyzed if judges were subject to disqualification on so ephemeral a basis. See Camacho, 868 F.2d at 491. We therefore uphold the order denying the motion for recusal.

V. CONCLUSION

We need go no further. For the reasons elucidated above, we hold that the achievement of racial diversity can be a constitutionally permissible interest in the context of K-12 education. Nevertheless, the use of racial distinctions always should be a last resort. Here, the School Committee has failed to show that a racially restrictive formula was necessary to achieve its legitimate goal. Because the transfer provisions of the

Lynn Plan fail to satisfy the narrow-tailoring requirement set out in the Supreme Court's equal protection jurisprudence, those provisions are unconstitutional and their further use must be enjoined. Consequently, we reverse the district court's ruling upholding the disputed transfer provisions, affirm the ruling denying the motion for recusal, vacate the judgment below, and remand for further proceedings consistent with this opinion. Without limiting the foregoing, we direct the court, on remand, to enter a revised judgment granting appropriate declaratory and injunctive relief to the plaintiffs.

The decision on the merits is reversed, the denial of the motion to recuse is affirmed, the judgment below is vacated, and the case is remanded for further proceedings. Costs shall be taxed in favor of the plaintiffs.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 03-2415

SAMANTHA J. COMFORT, ETC., ET AL.,
Plaintiffs, Appellants,

v.

LYNN SCHOOL COMMITTEE ET AL.,
Defendants, Appellees.

ERRATA SHEET

The opinion of this Court issued on October 20, 2004 is corrected as follows:

On page 4, line 9, change "claim" to "claims"

On page 4, line 10, insert "and Title VI" after "1983"

On page 20, line 7, insert "and Title VI" after both instances of "1983"; change "claim" to "claims"

On page 20, line 10, insert after "claims" (both in the traditional sense and in the sense that they have been presented to this court without sufficiently developed argumentation)

On page 48, line 17 — insert "and Title VI" after 1983; change "claim" to "claims"; insert footnote 12 signal after "claims." to read:

> We note that "[d]iscrimination that violates the Equal Protection Clause . . . committed by an institution that accepts federal funds

also constitutes a violation of Title VI." Gratz, 539 U.S. at 276 n.23. It follows, then, that the denial of school transfers based on race violates both Title VI as well as section 1983.

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 03-2415

SAMANTHA J. COMFORT, ETC., ET AL.,
Plaintiffs, Appellants,

v.

LYNN SCHOOL COMMITTEE ET AL.,
Defendants, Appellees.

Before
Selya, Dyk,* and Howard,
Circuit Judges

Order of Court
Entered: November 10, 2004

The appellants did not offer any developed argumentation in their appellate briefs in support of their claims under 42 U.S.C. 1981, 1985, and 1986. That omission is fatal. See United States v. Bongiorno, 106 F.3d 1027, 1034 (lst Cir. 1997); United States v. Zannino, 895 F. 2d 1, 17 (lst Cir. 1990).

By the Court:
/s/ Richard Cushing Donovan
Richard Cushing Donovan, Clerk

* Of the Federal Circuit, sitting by designation.

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 03-2415

SAMANTHA J. COMFORT, ETC., ET AL.,
Plaintiffs, Appellants,

v.

LYNN SCHOOL COMMITTEE ET AL.,
Defendants, Appellees.

Before
Selya, Dyk,* and Howard, Circuit Judges

ORDER OF COURT

Entered: November 22, 2004

The appellants' renewed petition for panel rehearing is denied. None of the claims that are the subject of this renewed petition was suitably developed in the pre-argument appellate briefing. This is a fatal flaw. See United States v. Bongiorno, 106 F.3d 1027, 1034 (1st Cir. 1997) (explaining that "issues raised on appeal in a perfunctory manner, not accompanied by developed argumentation," are deemed waived); United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (similar). Nor is it obvious, as the appellants intimate, that they are entitled to relief under 42 U.S.C. § 1981. The answer to the

* Of the Federal Circuit, sitting by designation.

question whether a public school system and a pupil are parties to a "contract" within the meaning of section 1981 is highly ramified. The district court answered this question in the negative while dismissing the section 1981 claim before trial on this very ground. Comfort II, 131 F. Supp. 2d at 255 n.5. The other case law on the point points in the same direction. See, e.g., Woods v. Miamisburg City Schs., 254 F. Supp. 2d 868, 876 (S.D. Ohio 2003). Given the dubiety and the complexity of the problem, the appellants, had they wished to pursue the section 1981 claim, had an obligation to brief this issue face up and squarely. It is too late to attempt to remedy this omission in a post-judgment filing. "[A] party cannot be permitted to raise a new issue for the first time on a petition for rehearing in the court of appeals." Anderson v. Beatrice Foods Co., 900 F.2d 388, 397 (1st Cir. 1990) (opinion denying rehearing). The renewed petition for panel rehearing is denied.

By the Court:
/s/ Richard Cushing Donovan
Richard Cushing Donovan, Clerk

APPENDIX F

United States Court of Appeals
For the First Circuit

No. 03-2415

SAMANTHA J. COMFORT, ETC., ET AL.,
Plaintiffs, Appellants,

v.

LYNN SCHOOL COMMITTEE ET AL.,
Defendants, Appellees.

Before
Boudin, Chief Judge,
Torruella, Selya, Lipez, and Howard, Circuit Judges.

ORDER OF THE EN BANC COURT
Entered: November 24, 2004

The petition for rehearing en banc is granted. The panel decision dated October 20, 2004 is hereby withdrawn, and the judgement of even date vacated. The parties shall simultaneously submit supplemental briefs, limited to the issue of the constitutionality of the Lynn Plan, in the number, form, and format required for regular briefs; provided, however, that such supplemental briefs shall not exceed thirty (30) pages per side and shall be filed within thirty (30) days of the date of this order. Any part[ies] previously granted amicus status may, within the same time frame, file a supplemental amicus brief, not to exceed fifteen (15) pages. The en banc court

will convene on Monday, February 7, 2:30 p.m. to hear oral argument.

By the Court:
/s/ Richard Cushing Donovan
Richard Cushing Donovan, Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SAMANTHA J. COMFORT, on behalf of her minor child and friend, ELIZABETH NEUMYER, et al., Plaintiffs,	)	
v.	)	C.A. No. 99-11811-NG
LYNN SCHOOL COMMITTEE, et al., Defendants, and, COMMONWEALTH OF MASSACHUSETTS, Defendant-Intervenor.	)	
TODD BOLLEN, et al., Plaintiffs,	)	
v.	)	C.A. No. 01-10365-NG
LYNN SCHOOL COMMITTEE, et al., Defendants.	)	

GERTNER, D.J.:

AMENDED[1] MEMORANDUM AND ORDER
September 5, 2003

[1] This decision amends factual and typographical errors in the Court's decision of June 6, 2003

I. INTRODUCTION

The issues raised in this litigation are critically important, not just for the parties, but for the nation. This case and others like it around the country require courts to grapple with whether and how public school officials may implement race-conscious programs in order to fulfill the Constitution's promise of the Equal Protection of the laws, a promise articulated with special force fifty years ago in Brown v. Board of Education, 347 U.S. 483 (1954).

Plaintiffs, parents of elementary school children in Lynn, Massachusetts, challenge their city's school assignment plan (the "Lynn Plan")[2] because it takes race into account in permitting children to transfer from their neighborhood schools to other schools within the district.[3] Since the implementation of the Lynn Plan entitles the Lynn Public Schools to certain additional aid from the Commonwealth of Massachusetts under the state's Racial Imbalance Act ("RIA"),[4] the plaintiffs also challenge the state law on its face and as applied in this case. Both the Lynn Plan and the state laws under which it was enacted, they say, violate the Constitutions of the United States and Massachusetts, as well as various federal civil rights statutes. They petition the Court to invalidate the Lynn Plan and to enjoin the defendants from employing racial classifications in student assignments and in the

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[2] The Plan, which incorporates other reforms not at issue in this case, is known officially as "A Voluntary Plan for School Improvement and the Elimination of Racial Isolation."

[3] The Lynn Public Schools comprise a single school district. That district is further divided into attendance zones also referred to as districts. Students are assigned to their "district" schools but may also request transfers to "out-of-district" schools. The term "out-of-district" school is misleading as these schools are still within the same school district. For the sake of clarity, I will refer to "district" schools as "neighborhood schools" and "out-of-district" schools as "non-neighborhood schools."

[4] Mass. Gen. Laws c. 71 §§ 37C, 37D and c. 15 §§ 1I, 1J, 1K.

distribution of state aid. For the reasons set forth below, I **DISMISS** plaintiffs' claims and enter **JUDGMENT** in favor of the defendants.

To the plaintiffs, the issues could not be simpler: Taking race into account in school transfers violates the Equal Protection Clause. They contend that it sends the wrong message to the children of Lynn, namely, that their race matters when, in fact, the Constitution requires color blindness. Plaintiffs concede that reducing racial isolation and educating students to be citizens in a multiracial nation are important goals. They also concede that Lynn has accomplished those goals and has vastly improved its schools since the Plan's implementation. But they claim that neither these goals nor this record are sufficiently compelling under the Constitution to justify Lynn's race-conscious school transfer policy.

To the defendants, the Lynn Plan not only complies with the Equal Protection Clause but is critical to maintaining that compliance. The Plan seeks to encourage learning and good citizenship in a racially diverse environment. The message it conveys to the students is that our society is heterogeneous, that racial harmony matters -- a message that cannot be conveyed meaningfully in segregated schools. In order to teach that the "content of [one's] character"[5] does not depend on color, a child must interact with children of other races, an interaction that necessarily challenges nascent stereotypes. Without meaningful social contact, talk of tolerance and cooperation is nothing but an abstraction. If the Lynn school transfer plan were eliminated, the elementary schools of Lynn would become more and more racially segregated, with a host of pernicious consequences.

While there has been a rising tide of litigation challenging the government's use of racial preferences,

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[5] Martin Luther King, Jr., "I Have a Dream," in A Call to Conscience: Landmark Speeches of Dr. Martin Luther King Jr. 75 (2002).

both in and outside of the educational context, and while courts increasingly treat such programs with suspicion, it is not established -- as the plaintiffs, not to mention many in the media, contend -- that any government use of race for the purpose of promoting diversity is unconstitutional. The answer to the question "Can schools constitutionally use race in furtherance of education in a multiracial society?" is and has always been "It depends." It depends upon the setting -- for example, K-12 education,[6] in contrast to higher education or employment, raises very different issues requiring distinct legal analysis. And it depends upon the nature of the plan -- its purposes, its flexibility, the level of coercion involved, its history, its administration.

On both axes -- the setting and the nature of the plan -- the Lynn Plan is different from race-conscious plans that have been successfully challenged. In constitutional parlance, the Lynn Plan passes muster even under the most stringent "strict scrutiny" test: It serves "compelling" state interests and is "narrowly tailored" to achieve them.

On the setting: Unlike cases involving law schools, undergraduate degree programs, or even elite "magnet" high schools, Lynn's school transfer policies are not about admissions or rejections in a competitive environment where merit supposedly determines "winners" and "losers" in a zero-sum game. The fact that one child may transfer to a particular elementary school while another may not does not affect the quality of the educational experience for either. The parties agree that, under the Plan, all Lynn schools are not only comparable, but by 2003, equally successful.

Indeed, K-12 education involves a setting in which diversity has a different resonance than in any other. The goal of elementary education is, as the Supreme Court noted nearly fifty

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[6] "K-12" means kindergarten through twelfth grade.

years ago, to foster good citizenship[7] -- not, for example, to train skilled professionals or to engage in a commercial enterprise. And in the twenty-first century, good citizenship necessarily entails the ability to function in an ever more heterogeneous democracy.

On the Plan: The Plan that Lynn officials created, and that the state authorities approved, is minimally intrusive. It uses public funds for two critical public goals -- to enable parents to choose integrated schools over segregated ones and to minimize racial imbalance across the school system. Since a racially diverse learning environment is essential for citizens-to-be, the Plan is a critical part of a comprehensive, districtwide plan to improve the quality of education for all Lynn's children.

Unlike many of the school desegregation efforts that have roiled courts and legislatures in the years since Brown, the Lynn Plan does not entail coercive assignments or forced busing; nor does it prefer one race over another. It allows every child to attend his or her neighborhood school. It also allows -- and indeed encourages -- elective transfers to schools outside the neighborhood, not to offer "choice" for its own sake, but to promote as much integration as possible while maintaining a neighborhood school system. Space permitting, transfers are approved unless they thwart the goal of reducing segregation in the city.

The history and track record of the Plan also set it apart. Before the Plan, Lynn's neighborhood schools were troubled, overcrowded, and racially segregated. City officials were accused of exacerbating these problems by allowing white students to transfer out of minority schools, but not vice versa. And even when official

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[7] Brown, 347 U.S. at 493 (explaining that public education provides "the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values in preparing him for later professional training, and in helping him to adjust normally to his environment").

discrimination ended, racial divisions persisted, with documented results: Schools that were largely populated by minority students received less funding, had high teacher turnover, and had lower test scores. Throughout the system, even in the largely white schools, racial tensions and divisions persisted. White enrollment was declining at an alarming rate -- the phenomenon known as "white flight."

After experimenting with race-neutral alternatives without success, Lynn officials sought the advice of experts, including social psychologists, educators, and even demographers. They concluded that the only way to improve the schools was to implement a comprehensive program that employed not only the race-conscious transfer policy at issue here, but a host of other innovations and resource infusions. Their goal was not simply to create a diverse learning environment, but also to support it and to ensure its success through curricular changes and materials, teacher and staff training, as well as improved facilities. They created a flexible plan, based on sophisticated data collection and analysis, that changes with the conditions in Lynn. Anyone denied the placement of his or her choice can appeal, as many of the plaintiffs in this case have done.

By 2002, when the trial of this case began, it was clear that the Lynn Plan played an important part in creating a thriving, diverse, and integrated urban school system, successful on all fronts and by all measures -- where race relations are positive and racial and ethnic tensions are absent; where students from diverse backgrounds maintain friendships and are well represented in student government and extracurricular activities; where student attendance rates are uniformly high and test results reflect substantial gains, particularly in the schools located in Lynn's urban center; and where there are extraordinarily low levels of student conflict, crime, and violence.

Nothing about the plaintiffs' challenge or the government's constitutional and statutory obligations obliges the Court to dismantle this Plan.

II. PROCEDURAL HISTORY

Before me presently are two civil actions, Comfort v. Lynn School Committee, Civ. No. 99-11811, and Bollen v. Lynn School Committee, Civ. No. 01-10365.

A. The Comfort Litigation

1. Parties

Samantha J. Comfort, Rhonda Campbell, Karen Agnew, Andrew and Cattibell DiGaetano, and Jean and William O'Neil, all parents of school children enrolled in the Lynn district, brought the Comfort action in 1999. The Comfort plaintiffs sued the Lynn School Committee, its individual members,[8] the Superintendent of Lynn Schools,[9] the City of Lynn and its Mayor. In December 1999 the Commonwealth of Massachusetts intervened as a party defendant for limited purposes.[10]

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[8] The board members, sued in their official capacities, currently include Edward J. Clancy (Mayor and Chairperson), Patricia Capano, Donna M. Coppola, Arthur Fiste, John Ford, Jeffrey Newhall, and Loretta Cuffe O'Donnell.

[9] The current Lynn Superintendent, also sued in his official capacity only, is Nicholas Kostan.

[10] The Commonwealth intervened under 28 U.S.C. § 2403(b) to defend the constitutionality of the RIA. The Commonwealth expresaly preserved its Eleventh Amendment defenses in its Motion to Intervene as a Party Defendant and its Answer to the Plaintiffs' First Amended Complaint.

The NAACP Legal Defense and Education Fund also moved to intervene in this proceeding. That motion was denied but the organization was permitted to participate as an amicus. The submissions of amici advance the joint interests of the NAACP Legal Defense and Educational Fund, Inc.; the Lawyers' Committee for Civil Rights Under the Law for the Boston Bar Association; Pamela Freeman on behalf of her minor child, James Freeman, a student in the Lynn public school system; Barbara and Anthony Murkison on behalf of their minor children, Tia, Cassandra, and Jason Murkison,

The Comfort plaintiffs challenged the RIA and the Lynn Plan under the Equal Protection Clause of the United States Constitution, Article 111 of the Massachusetts Declaration of Rights, and several federal civil rights statutes, including 42 U.S.C. §§ 1981, 1983, and 2000d. The RIA obliges the state Board of Education to address de facto segregation in Massachusetts' public schools, either by funding voluntary efforts of individual school districts to integrate or, if necessary, by compelling them to adopt plans to improve racial balance in school populations. Comfort v. Lynn School Comm., 100 F. Supp. 2d 57, 62 (D. Mass. 2000). The Lynn Plan, as I describe more fully below, entails a neighborhood school system that permits transfers to out-of-neighborhood schools, unless such transfers would result in increased "racial isolation (too low a minority percentage) or racial imbalance (too high a minority percentage)" in a particular school. Id. at 61.

2. Preliminary Injunction

The Comfort plaintiffs sought a preliminary injunction to enjoin the district's use of race in the Plan. I denied the motion, finding that the plaintiffs showed neither a likelihood of success on the merits nor irreparable harm. Id. at 59-60. The First Circuit in Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998), held that diversity "might be sufficiently compelling, in specific circumstances, to justify race-conscious actions." Id. at 796. The intensely fact-bound question of what educational circumstances would permit race-conscious actions was hardly amenable to resolution on the truncated record of a preliminary injunction. Comfort, 100 F. Supp. 2d at 66. Nor could the Comfort plaintiffs demonstrate irreparable harm from the continuation of

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also students in Lynn schools; and the Northshore Branch of the NAACP, on behalf of its membership.

The United States submitted an amicus brief in support of the defendants at the preliminary injunction stage of the case.

the Plan since, as described below, most were content with the schools their children were in and did not intend to seek further transfers. Id. at 63-64.

The plaintiffs did not appeal the denial of their Motion for a Preliminary Injunction.

3. Motions to Dismiss

The defendants moved to dismiss a number of the Comfort plaintiffs' claims on the grounds that (1) the Constitution does not allow a state to be sued for damages, and (2) the plaintiffs lacked standing to sue because their children had been placed in the schools of their choice and no longer wished to transfer. With certain exceptions, I granted these motions.

I dismissed the federal statutory civil rights claims for damages against the Commonwealth on Eleventh Amendment grounds, since there was no question that the state may not be sued for damages. Comfort v. Lynn School Comm., 131 F. Supp. 2d 253, 254 (D. Mass. 2001).[11] I also held that the Eleventh Amendment barred declaratory relief against the Commonwealth. Id. at 256. See infra Section V.A.1.

In a subsequent opinion, Comfort v. Lynn School Comm., 150 F. Supp. 2d 285 (D. Mass. 2001), I held that the plaintiffs lacked standing to seek injunctive relief against any of the defendants. Id. at 288. The plaintiffs had children who were contentedly enrolled in schools of their choosing and could not "demonstrate either actual present harm or a likely danger of direct injury in the future." Id. at 295-98.

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[11] The Eleventh Amendment precluded plaintiffs' claims against the Commonwealth under 42 U.S.C. §§ 1981 and 1983, as Congress did not expressly abrogate the sovereign immunity of the states in enacting them. Comfort, 131 F. Supp. 2d at 255. I also dismissed the plaintiffs' claims under Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, which forbids discrimination "under any program or activity receiving Federal financial assistance," since a state itself is not a "program or activity" for Title VI purposes. Id. at 254-55.

I held that the Comfort plaintiffs could pursue limited declaratory relief, as well as nominal damages. Id. at 298-99, 302. Specifically, I found that "prospective" declaratory relief was unavailable to the plaintiffs, id. at 302, but that they were nonetheless entitled to sue for a "retrospective" declaration that the Lynn Plan violated their legal rights. I now conclude that this finding was erroneous: a declaration, prospective or retrospective, is available only to plaintiffs that have standing because of a present case or controversy. See also infra Section V.A.1. In any event, the Comfort plaintiffs were free to litigate the substance of their claims for nominal damages. Comfort, 150 F. Supp. 2d at 298-99.

Of the original Comfort plaintiffs, only Samantha Comfort remains in this case.[12]

B. The Bollen Litigation

Rather than amend the existing action, plaintiffs' counsel added new parent plaintiffs in a separately filed lawsuit.[13] The Bollen plaintiffs, Todd and Laurie Bollen, Janeen Goodwin, Gina Leone, LeAnne Manuel, Michael and Meta Stinson, and Karen Tsaltas[14] sued the same defendants but added claims under 42 U.S.C. §§ 1985 and 1986 and listed members of the Massachusetts State Board of Education as defendants in their official capacities. Defendants move to dismiss a number of the Bollen plaintiffs' claims on standing grounds. That

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[12] The Comfort plaintiffs amended their complaint on December 9, 1999, to eliminate Jean and William O'Neil as plaintiffs. On January 19, 2001, I allowed the motion of plaintiffs Rhonda Campbell and Andrew and Cattibell DiGaetano to voluntarily dismiss their claims. Plaintiff Karen Agnew dropped her case as well on October 30, 2001.

[13] The lawsuits were then consolidated.

[14] Sued in their official capacities, the current Board members are James A. Peyser (Chairman), Roberta R. Schaefer (Vice-Chairperson), Charles D. Baker, Patricia A. Crutchfield, William K. Irwin, Jr., and Abigail Thernstrom.

motion [document #174] is **GRANTED IN PART AND DENIED IN PART.**[15] See infra Section V.A.2.a.

III. TRIAL

The parties filed multiple summary judgment motions, all of which I denied. In June 2002, the parties presented evidence in an eleven-day bench trial.

A. Plaintiffs' Case

Consistent with their view that the case was a simple one, plaintiffs offered one live witness, Meta Stinson, a Lynn parent and plaintiff; the deposition testimony of state Board of Education member Abigail Thernstrom; and several exhibits.

Ms. Stinson, who has three daughters currently attending Lynn schools, sought to have her daughter, Angelica Jackson, transferred from Breed Middle School to Pickering Middle School. That transfer was initially denied because Stinson had listed her daughter as "white" when she first registered her for school. Although Angelica's father is white, Stinson herself is of mixed racial and ethnic background -- French Canadian, Irish, Jewish, Barbadian, and African American. Upon learning of the denial, Stinson went to the Parent Information Center ("PIC") and added an additional racial designation of "black," but to no avail. Stinson conceded that although she was advised of her right to appeal, and indeed, even

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[15] The Bollen plaintiffs originally sought a preliminary injunction as well. That motion was withdrawn on April 11, 2001, after the defendants agreed to allow all of the children to attend their school of choice for the 2001-2002 school year, pending trial on the merits of their claims. Remarkably, only one of the plaintiffs, Gina Leone, took full advantage of the agreement to place her child, Troy LaMothe, into a school that was not otherwise available to her under Lynn's transfer policy.

On June 5, 2001, I granted the plaintiffs' voluntary motion to dismiss the claims of Janeen Goodwin on behalf of her child Sean. Plaintiff Michael Stinson, who sued on behalf of Angelica Jackson, noticed his voluntary dismissal on October 11, 2001.

though that appeal would have been successful,[16] she elected not to do so. In the interim, the district announced that at the Sewell-Anderson school fifth graders could remain for the sixth grade, and Stinson was satisfied with that placement.[17]

Significantly, Stinson testified that Angelica maintains a number of interracial friendships with her classmates, has a positive attitude about race, and gets along well with students of other races, even though Stinson has not personally discussed matters of race with her daughter. Stinson conceded that it is an important component of Lynn's educational mission to ensure that its students overcome racial stereotypes and acquire a better understanding of students with different racial backgrounds.

The plaintiffs also introduced the deposition testimony of Abigail Thernstrom, a member of the Massachusetts Board of Education. Thernstrom, though not offered as an expert, took issue with the views of certain school desegregation experts -- including Dr. Gary Orfield, a nationally renowned expert who testified in the defendants' case. She challenged Orfield's view that America's schools are growing increasingly racially segregated principally because she did not believe that "[t]he dividing line in America" is "between whites and nonwhites."[18] Deposition of Abigail Thernstrom ("Thernstrom Deposition"), Oct. 9, 2001, at 22.

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[16] It is undisputed that Angelica's multiracial status would have established her right to transfer to any school in the system.

[17] After Angelica transferred to Sewell-Anderson Elementary School, her sister Gabrielle was able to transfer there as well under Lynn's "sibling unification" provision.

Indeed, Stinson acknowledged that she has sought three transfers for her daughters, only one of which -- Angelica's to Pickering -- met with resistance from the PIC.

[18] Thernstrom would later state: "I don't believe in any of these classifications, I believe in giving parents maximum choice as to where their children should go to school, and . . . none of these classifications

Although a member of the Board of Education and charged with enforcing the RIA, Thernstrom opposed the Act in principle. She conceded that she could not speak with authority on the law since she lacked day-to-day familiarity with its terms.[19] Moreover, she acknowledged that she had no personal knowledge or experience of specific conditions in Lynn.

Finally, plaintiffs offered exhibits that pertained to the operation of the Lynn Plan and RIA and the extent to which racial categories are used in making transfer decisions.

B. Defendants' Case

Defendants countered with ten witnesses, five of whom were district administrators and educators with twenty to thirty years' experience in the Lynn system variously as students, teachers, and administrators. Significantly, these witnesses were in a position to describe the troubled state of Lynn schools before the Lynn Plan was implemented, and to attest to its impact afterward. They described pre-Plan efforts to improve the schools, all to no avail. And they lauded the current state of the school system under the Lynn Plan and the substantial improvements it has effected. Defendants also offered the testimony of a Lynn parent and a student, who described the actual workings of the system in the schools with which they were familiar.

Finally, defendants offered the testimony of a number of nationally known experts. The experts based their testimony on their personal observations of Lynn schools, a survey of Lynn students, interviews with teachers and

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are appropriate in my view. This kind of social engineering is not appropriate. . ." Thernstrom Deposition at 26.

[19] The RIA, she agreed, is "low on [her] personal list of priorities." Id. at 37. Indeed, when asked if the Board had conducted studies to determine whether or not the conditions that existed at the time the RIA persist today, Thernstrom replied, "My view of that would be we don't need a study, [those conditions] don't exist." Id. at 35.

administrators and other Lynn-specific data. The experts affirmed the importance of Lynn's race-conscious transfer policy to the district's educational objectives.

1. The Administrators:

Janet Birchenough has been Director of Equity and Program Support for the Lynn public schools since January 1992. Birchenough managed and supervised Lynn's Parent Information Center, the school district's central registration office, which oversees the day-to-day implementation of the Lynn Plan. In addition, the PIC gathers the data that Lynn officials use to certify that the Plan remains precisely tailored to accomplish the Plan's goals -- data about the school system, its schools, its students, simulations about demographic patterns in Lynn, and the likely composition of the schools if the Plan were to be eliminated.[20] Moreover, Birchenough testified from the perspective of nearly forty years' experience in the Lynn schools -- as an elementary school, as an art teacher working in eleven of the district's eighteen elementary schools and ultimately as an administrator. I found her testimony credible and relevant, and her knowledge of the system – of individual schools and the history of the Plan -- encyclopedic.

Patricia Barton, currently the principal of the Fecteau-Leary Middle School, also has 30 years of professional experience in the Lynn system. She testified

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[20] Birchenough's responsibilities also include direct oversight of the district's "magnet" schools (see infra Section IV.E.6 for a description of these schools), including program design, budget, management, and other systemwide programs designed to increase the integration of the Lynn schools. In addition, she is responsible for Lynn's language support programs, including its Transitional Bilingual Education Programs; the district's assistance to homeless families; and its Title IX policies, which involve, among other things, the coordination of the district's anti-harassment policies. She co-chaired Lynn's technology plans to make certain that all schools receive the same level of technological support and equipment. She also worked with the Superintendent to develop the John Collins Writing Program, which addresses writing deficiencies identified through MCAS testing.

credibly about her experience as a student attending racially isolated schools, as a teacher in a segregated system, and as an administrator who presided over that system's transformation under the Lynn Plan.

Nicholas Kostan, the current Superintendent of the Lynn School Department, also testified with considerable authority about the changes he has seen. He has been a teacher and a professional administrator in the Lynn school system for 31 years, first as a principal of the Breed Middle School. He serves as liaison between the Lynn School Committee and the Lynn School Department and at the same time oversees the PIC and works with teachers, parents, students, and the community.

Patricia Mallett is currently a teacher in the media center at the Brickett school, having taught in Lynn schools for twentysix years. During the transition to magnet school programming, she was the system's Magnet School Facilitator. Mallett testified from that unique perspective on the race-neutral alternatives that were tried and considered, as well as the success of the current Plan.

2. The Parents and Students:

Karen Horner is an African American parent of two current Lynn public school students. She is active in and serves as the Acting Secretary for the Lynn branch of the NAACP. She moved from Boston to avoid living in a segregated neighborhood and to provide her children with an integrated education. Horner's children, Kyle, age 17, and Erroll, age 14, have attended neighborhood and out-of-neighborhood schools in Lynn, and she spoke movingly about the quality of her children's experiences.

Nicole Oak is a white student who had just graduated from the Lynn school system in June 2002 and described her educational experience there.

3. Defendants' Experts:

Dr. Gary Orfield is a nationally recognized political scientist and one of the leading national experts in the

field of education and equal educational opportunity, which encompasses issues such as racial segregation, racial isolation, desegregation, housing and racial change, and their effects on students in primary, secondary, and higher education.[21] He is a professor of education and social policy at Harvard University, where he is co-director of the Harvard Project in School Desegregation. The Project in school desegregation is an interdisciplinary research center that commissions research across the nation on issues of civil rights policy, racial change, and racial inequality. Significantly, Dr. Orfield based his testimony not only on his own research, experience, and studies from other jurisdictions but also on an extensive amount of data and information about Lynn and its public schools in particular. Orfield put the full resources of the Harvard Civil Rights Project ("Harvard Project") (a separate entity from the Project in school desegregation with a broader research focus) into his study of Lynn and gathered information firsthand during a site visit as well.

Nancy McArdle testified as an expert on the demographic and housing trends in Lynn. She was a researcher with the Joint Center for Housing Studies at Harvard for fourteen years. McArdle has researched, consulted, and published in the field of housing policy, with specific attention to demographic, population, and immigration trends. Like Dr. Orfield, McArdle relied on a wide variety of data sources specific to Lynn.

Dr. Melanie Killen, a developmental and education psychologist, testified on how racial segregation and racial diversity impact the social and moral development of children and adolescents. She is a Professor of Human Development in the College of Education at the University of Maryland, and she presently serves as Associate Director for the Center for Children, Relationships and Culture, a research department with

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[21] Dr. Orfield has been a court-appointed expert in federal desegregation cases in St. Louis, San Francisco, and Little Rock, and a state expert in a case in Los Angeles.

faculty from developmental psychology and education psychology. Dr. Killen has focused specifically on how children and adolescents evaluate exclusion based on race and ethnicity, as well as on intergroup relationships and conflict resolution across lines of ethnicity. She, too, based her expert testimony on a series of direct observations and interviews on site in the Lynn Public Schools, as well as her review of the Harvard data.[22]

Finally, Dr. John Francis Dovidio testified as a nationally renowned social psychologist with a particular interest in the subdiscipline of intergroup relations and the development of racist attitudes. Dr. Dovidio is presently the Charles A. Dana Professor of Psychology and Dean of Faculty and Provost at Colgate University. His research has focused on social psychology and race relations among elementary school children, secondary school students, adolescents, and college students. He testified about how and when stereotypes are formed and what strategies can be deployed to prevent their formation. He offered his expert opinion based on personal visits and the Harvard data.

C. Plaintiffs' Rebuttal

Plaintiffs offered one witness in rebuttal, Dr. Christine Rossell, a professor of political science at Boston University. Dr. Rossell's field of interest is the comparative efficacy of different approaches to school integration.

While Dr. Rossell had been a paid consultant to Lynn in the development of its original school desegregation plan in 1987 (when she supported an earlier, and more intrusive iteration of the Plan), at the time of her testimony, she had no current knowledge of the Plan. She based her conclusions on her research involving other

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[22] The methodologies Dr. Killen used to evaluate the students and the school environment are the same methodologies she is using in a study funded by the National Institutes of Health.

school systems and what she had remembered of that early draft of the Lynn Plan from fifteen years earlier.

IV. FINDINGS OF FACT

A. The Racial Imbalance Act

In 1965, Massachusetts became the first state in the nation to enact a law addressing racial imbalance in the public schools.[23] The Racial Imbalance Act ("RIA"), Mass. St. 1965, c. 641, §§ 1 et seq. (codified at Mass. Gen. Laws c. 71 §§ 37C, 37D, and c. 15 §§ 1I, 1J, 1K), had its origin in a legislative finding that racial imbalance in Massachusetts public schools was so dramatic as to reach a crisis level, with damaging effects on the students. The Massachusetts Board of Education's "Kiernan Report" not only concluded that "[r]acial imbalance represents a serious conflict with the American creed of equal opportunity," School Comm. v. Bd. of Education, 366 Mass. 315, 318 n.5 (1974) (quoting the Kiernan Report) (internal quotation marks omitted), it also underscored the extraordinary impact of racial imbalance throughout the school system. Racial imbalance was found to encourage prejudice among students of all races, inadequately prepare students for life in multiracial communities, and produce inferior educational facilities for African Americans.[24] Id.

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[23] Dennis Ford Eagan, The Past, Present, and Future of Desegregation Law in Massachusetts, 34 Suffolk U. L. Rev. 541, 556-57 (2001).

[24] A federal district court came to a similar conclusion in Barksdale v. Springfield School Comm., 237 F. Supp. 543 (D. Mass. 1965), which held that a racially imbalanced school denied black students equal opportunity for education. Id. at 546. The court ordered the Springfield School Committee to devise a plan to "eliminate to the fullest extent possible racial concentration in its elementary and junior high schools." Id. The First Circuit, 348 F.2d 261 (1st Cir. 1965), ultimately reversed the trial court because the School Committee had voluntarily undertaken substantially the same steps that the district court required before the case was filed, id. at 265; the First Circuit nonetheless observed that there was ample evidence to support the district court's findings:

As a result, the legislature found that racial imbalance in state public schools posed an "emergency" situation, see School Comm. v. Bd. of Education, 352 Mass. 693, 698 (1967), and enacted the RIA to correct it. Section 1 of the RIA provides:

> It is hereby declared the policy of the commonwealth to encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools.

Mass. St. 1965, c. 641, § 1 (codified with amendments at Mass. Gen. Laws c. 71 § 37C). Toward this end, the RIA encourages -- but does not require -- all schools to devise "plans" to promote racial balance. The only instance in which the law imposes a duty upon a school committee to prepare such a plan is when the school committee has proven unable to satisfy requests from nonwhite students attending racially isolated (predominantly minority) schools to transfer to racially imbalanced (predominantly white) schools.[25] Mass. Gen. Laws. c. 71, § 37D; see also School Comm., 366 Mass. at 322-23.

> [R]acially imbalanced schools are not conducive to learning, that is to retention, performance, and the development of creativity. Racial concentration in his school communicates to the [African American] child that he is different and is expected to be different from white children. Therefore, even if all schools are equal in physical plant, facilities, and ability and number of teachers, and even if academic achievement were at the same level at all schools, the opportunity of [African American] children in racially concentrated schools to obtain equal educational opportunities is impaired.

Id. at 263 (quoting the district court's findings).

[25] The RIA defines the terms "racial imbalance," "racial balance," and"racial isolation" as follows:

"Racial imbalance," the condition of a public school in which more than fifty percent of the pupils attending such school are non-white.

The state Board of Education[26] is to assist in the development of any plan, voluntary or mandatory, and must approve it prior to implementation. Mass. Gen. Laws c. 76, § 12A. The plan must set forth in detail the district's proposed changes in school attendance zones; any possible alteration to or expansion of existing facilities, as well as any planned addition of new school buildings; and any "other measures" that the district anticipates implementing to ensure space for students seeking "desegregative transfers," i.e., transfers that will reduce racial imbalance. Mass. Gen. Laws c. 71, § 37D.[27]

"Racial balance," the condition of a public school in which more than thirty percent but not more than fifty percent of the pupils attending such school are nonwhite.

"Racial isolation," the condition of a public school in which not more than thirty percent of the pupils attending such school are non-white.

Mass. Gen. Laws c. 71, § 37D. It is important to note that the Lynn student assignment plan at issue in this case has drafted its own definitions of these terms, as I explain below. See infra Section IV.C.

[26] The Massachusetts Board of Education supervises the larger Department of Education, of which it is a part. Mass. Gen. Laws, c. 15, § 1. The remainder of the Department is comprised of advisory councils to the Board. Id., § 1G.

[27] A "desegregative transfer" is defined by the Board of Education to describe any one of the following conditions:

> Students transferred from a school in which racial imbalance exists to a school in which racial imbalance or racial isolation or racial balance exists.
>
> Students transferred from a school in which racial isolation exists to a school in which racial isolation or racial balance exists.
>
> Students attending a school other than their neighbourhood school (neighbourhood or attendance area) and are effecting racial balance.
>
> Students attending a school different from the one they would have been assigned if there were no desegregation plan, and such attendances are effecting racial balance or reducing racial isolation.
>
> Students who are assigned to a school different from the one they would have been assigned to prior to controlled choice. Such attendance contributes to racial balance.

Under the RIA, the Commissioner of Education has the power to withhold school construction funds and other state aid if a school district does not act within a reasonable time to reduce an identified racial imbalance in its system. Mass. Gen. Laws c. 15, § 1I, ¶ 2; see also School Comm., 366 Mass. at 323. A 1974 amendment provided affirmative financial rewards to school districts that undertake voluntary plans. Mass. St. 1974, c. 636, §1. Such incentives included 100% state reimbursement of certain student transportation costs, substantial funding of the costs of establishing magnet schools, and payments of $500 to the district for each student transfer that reduces racial imbalance or isolation. Mass. Gen. Laws c. 15, §1I, ¶¶ 3, 4.[28] The city of Lynn submits yearly "entitlement reports" certifying the number of desegregative student transfers that occurred in its school system in the prior school year; the state responds with aid monies based on the numbers Lynn provides.

From 1974 until 1984, the Act authorized state reimbursement for up to 75% of the cost of approved school renovation or construction directed at reducing racial imbalance in school populations. By 1984, the rate of reimbursement was increased to 90%, Mass. St. 1984, c. 394, § 5, where it remained until 2001, when the legislature eliminated the reimbursement, Mass. St. 2000, c. 159, § 36.[29] In Lynn's case, state assistance provided under the RIA supplied 90% of the funding for

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> Students who are not attending their walk-zone schools and are effecting desegregative choice.

Commonwealth of Massachusetts Department of Education, "Desegregative Transfers."

[28] The state deposits these payments into local "Equal Education Improvement Funds," from which the local school committees may draw monies to support the quality of education within their districts. Id. §1I, ¶¶ 4, 5.

[29] This amendment applies prospectively and does not affect the state's existing 90% funding contributions to renovation or construction efforts in voluntary plans predating the amendment.

school renovations and construction that the city outlined in its 1990 voluntary plan.

B. Racial Imbalance in Lynn's Public Schools

In the nearly ten years preceding the adoption of the Lynn Plan, Lynn faced two serious problems -- substantial overcrowding of its neighborhood schools and significant levels of racial imbalance. Significantly, the state attributed the latter not only to growing residential segregation within the community, but also to the school district's own policies and practices. Indeed, correspondence during this period suggests that state officials felt Lynn's actions and inactions made the city vulnerable to state and/or federal lawsuits alleging de jure segregation.

The emergence of increasingly racially identifiable schools in Lynn created a crisis. A number of witnesses told of conditions not unlike those targeted in the Kiernan Report. Janet Birchenough observed racial polarization and severe resource inequalities between the predominantly minority and identifiably white schools where she taught. These inequalities were apparent on all fronts, including building facilities, learning materials, and teacher commitment. The predominantly white schools were well-maintained and well-managed; parents were deeply involved in their children's education. The minority schools, in contrast, limped along with crowded classes and outdated materials. There were discipline problems: parents and administrators alike were apathetic; students were angry, felt abandoned, and often lashed out. Attendance rates were low; achievement at all levels suffered. Class sizes were larger in identifiably minority schools than in identifiably white schools.

Wherever possible, teachers with seniority -- who had priority in choosing new openings -- transferred out of minority schools into the identifiably white, wealthier schools, where the school climate was more conducive to learning and teaching. There was no professional training

for teachers to prepare them for teaching a diverse student population, and little or no curricular support.

Birchenough observed that the racially charged and intolerant atmosphere in the schools led to cross-racial conflict, the students' frequent resort to racial slurs, as well as tendencies to self-segregate by race at recess and in cafeterias and classrooms. This was so in all of Lynn's schools, in the betteroff, predominantly white schools that harbored small minority populations as well as in the more racially mixed schools. Birchenough's observations were confirmed by other participants, including Principal Barton, Superintendent Kostan, and Ms. Mallett.

1. 1977: The First Warning

In 1977, the Board of Education first confronted Lynn about the racial imbalance in its schools. Specifically, the Washington Community School ("Washington"), one of Lynn's elementary schools, was found to have a 57.2% minority student population, when the overall district was only 9% minority. The Board of Education attributed the concentration of minority students at Washington in part to residential patterns, but more significantly to the district's school assignments, which the state roundly condemned. Administrators regularly allowed minority transfers into the already racially isolated Washington Community School and assigned all bilingual classes to that school's annex.

Over the next decade the Board of Education regularly warned Lynn that its action and inaction exposed it to charges of de jure segregation. In contrast to other cities across the nation, however, by implementing its voluntary Plan, Lynn officials ultimately headed off court involvement and dramatically changed its schools for the better.

2. 1979: Washington, the First Magnet School

In 1979 a magnet school program was established at the Washington school. The state offered supplemental funding to the Washington magnet school program,

conditioned on the district's adoption of a voluntary transfer policy that would attract white students. Lynn accepted this invitation and adopted a voluntary transfer policy.

In April 1980 the district announced a more comprehensive plan. Neighborhood schools remained the centerpiece of the plan with these exceptions: White students from schools that were 70% or more white had the right to transfer to the Washington school, whereas white students already enrolled in that school would not be permitted to transfer out of it. Nonwhite students in the Washington district and elsewhere had the right to transfer to any school that was more than 70% white, but white students were not permitted to make such transfers.

Again, there was official manipulation of the policy. Officials were accused of bending the rules for white parents. Administrators regularly approved the requests of white parents to transfer their children out of predominantly minority neighborhood schools. For example, in the 1987-1988 school year 107 out-ofneighborhood white students were attending the 93% white Aborn high school as a result of transfers. Of these 107 students, more than half of them resided in the attendance zone that fed into the Ingalls high school, which was located in a minority neighborhood. Lynn officials conceded that these transfers were in blatant violation of the school assignment policy in place at the time.[30]

3. 1980s: Profound Changes in Lynn

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[30] The Department of Education was also concerned about the closing of seven schools without taking racial balance into consideration, the loss of seven teachers trained with state funds in facilitating integration, and the increase in class size at the Washington school, well beyond the city's average, which reduced its attractiveness to transfers.

Between 1980 and 2000 racial and ethnic minorities moved into Lynn in considerable numbers, transforming a city that was 93% white to 63% white. Defense expert Nancy McArdle, citing census data, noted that the child population of Lynn went from 90% white to more than half minority during this period. More and more, Lynn's residents began to self-sort into neighborhoods by race.

The 1980 Census found that the northern and western areas of Lynn were 90% white, while a belt of moderately integrated neighborhoods surrounded a minority enclave in south central Lynn. By the end of the decade, these trends intensified.

The schools, like Lynn's neighborhoods, likewise grew more and more racially polarized. While the magnet program at Washington -- the only such program in Lynn in the early 1980s -- saw minor changes in minority concentration, dropping from well above 50% to 44% during this period, the minority share in other minority-identifiable elementary schools in Lynn dramatically increased.

The school system was troubled, with high absentee rates, racial tension and conflict, and chronically low test scores. Racial polarization in Lynn's neighborhoods and schools continued into the mid-1980s. By 1984, notwithstanding the city's demographics, then roughly 83% white and 17% minority, four of Lynn's seventeen elementary schools had minority populations of between 35% and 50%. The remaining schools were overwhelmingly white and remained so until 1987, even as the minority student population in Lynn climbed to 26% over the intervening three years.[31]

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[31] In May 1984, the Department of Education confronted Lynn a second time, this time to complain of the district's failures to meet various state and federal bilingual and special education requirements. Hispanic students brought a federal civil rights suit in 1985 claiming that the district denied them appropriate language programming and educational services. Lynn ultimately submitted to the terms of a consent judgment that required it to take steps to improve its bilingual education program.

4. 1986: A Series of Failed Voiuntary Plans

The state Department of Education urged Lynn to adopt a longterm, comprehensive plan to defeat racial isolation and imbalance. Lynn formulated such a plan in April 1986 but elected not to seek state approval (as the RIA requires). As a result, grant monies offered by the state for Lynn's "desegregation coordinator" were suspended mid-year, due to Lynn's stalled progress. The district ultimately drafted a second voluntary plan, which the state approved in September 1986 but Lynn never implemented.

5. 1987-1988: Greater Imbalance; More Accusations

By 1987 four elementary schools had become minority dominated, four other elementary schools were at least 95% white, and three more were hovering at around 90% white student enrollment.

In April 1987, the Lynn School Committee developed a third voluntary plan, which the Board of Education approved. Lynn would launch and develop five schools, designated "magnet" schools, in the first year of implementation, with five more to follow in the next year. With the state's approval would come additional funds to support the necessary construction and renovation of facilities to improve these schools. The plan also approved a redrawing of elementary and junior high school attendance zones to assist with the desegregative effort.

However, certain aspects of the plan, slated for implementation in September of 1987, were delayed. The district did not implement its proposed class-size maximums, and the school year began with the elementary and middle school attendance zones unchanged.

Significantly, school officials continued to approve improper segregative transfers. By January 1988, state officials made their accusations more pointed than ever before. In a letter to Lynn's Superintendent they noted:

> It appears that the condition of minority identifiable schools in Lynn is directly [at]tributable to past actions and inactions by Lynn School officials. The most significant finding is that the School Committee failed to enforce its own controlled transfer policy and has admitted to that fact.

Again, the message was clear: Lynn's "actions and inactions," its failure to enforce its own plan in an evenhanded way, and its own admissions of these facts made the district vulnerable to charges of de jure segregation. The state withdrew its approval of Lynn's Plan.

6. 1988-1990: Drafting the Current Plan

In its February 1988 Plan, Lynn officials admitted that official actions had exacerbated racial isolation and imbalance. They redoubled their efforts, this time soliciting feedback from the community, which -- no doubt because of Lynn's history -- eyed Lynn's proposed actions warily. A letter from Christine Rossell -- who consulted for Lynn during this period but now serves as the plaintiffs' expert in this case -- was more sanguine, observing that Lynn stood "an excellent chance of desegregating its six minority schools and minority isolated schools."

A key point of contention was student assignment. The state Department of Education was concerned that Lynn's use of voluntary transfers and magnet programs would not be sufficient to reverse the decades-long trends toward racial imbalance, a trend exacerbated by official action.[32] Lynn, however, remained committed to a voluntary transfer plan and refused to assent to

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[32] At one point, Lynn proposed a plan that would gerrymander the Ingalls and Aborn neighborhoods to make them even more imbalanced. Lynn proposed to redistrict the Ingalls school zone by annexing the white section of the Ingalls school zone, which was 53% minority, into the Aborn zone, which was overwhelmingly white.

"restricted choice" or "controlled choice" regimes that the Department was recommending.

Finally, in September 1989, Lynn devised yet another amended plan, which the state accepted. This new Plan, the terms of which I will set forth in detail below, guaranteed that every student could attend his or her neighborhood school. In addition, a student could transfer from the neighborhood school to another school as long as the transfer improved the racial balance in either the neighborhood or the destination school. The Plan gave assurances that there would be space for such transfers in new and renovated schools.

In February 1990 the Plan was amended to allow for "neutral transfers," that is, transfers that would neither improve nor adversely affect racial balance in the schools that were party to the transfer. The state approved this amendment.

A 1999 amendment to the Plan added more flexibility to the transfer system, instituting an appeals process for transfer denials and certain exemptions for bi- and multiracial students[33] and cases of extreme hardship.[34] This Plan is the one that the plaintiffs challenge.

C. The Current Plan

It is important to note at the outset that under the Lynn Plan every student in Lynn is entitled to attend the school in his or her neighborhood.[35] Students have options beyond their neighborhood schools if their proposed transfers are "desegregative" -- i.e., when they contribute to the districtwide integration effort. Additional "neutral transfers" are allowable as well, provided that they are

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[33] As noted above, this requirement means that Angelica Jackson, daughter of plaintiff Stinson, would have been able to transfer freely out of her neighborhood school to any other school in Lynn.

[34] See infra Section V.A.2.

[35] The Lynn Plan does not apply to school assignments for students participating in bilingual or special education programs.

approved by the school district's PIC and the sending and receiving principals.[36]

Whether or not a transfer is desegregative or neutral turns on the interplay of three factors: the racial composition of the sending and receiving schools and the student's race. Schools are classified as either "racially balanced," "racially isolated," or "racially imbalanced." An elementary school is considered "racially balanced" if its minority[37] population falls within +/- 15% of the overall percentage of minority students in the Lynn district.[38] For the middle and high schools racial balance is +/- 10% of the district population. When the proportion of minority students in a school exceeds the range of racial balance, that school is classified as "racially imbalanced." Likewise, a school in which the number of white students surpasses the outer bounds of racial balance is "racially isolated."

For example, Lynn's student population for the 2001-2002 school year was 42% white and 58% nonwhite. By the Lynn Plan's definitions, then, an elementary school that enrolled between 43% and 73% minority students would qualify as racially balanced. Middle and high schools required a tighter fit of between 48% and 68% minority students. Elementary schools with more than 73% minority students in the 2001-2002 school year --

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[36] Neutral transfers at the middle and high school level are available until August 1. Elementary school students may participate in neutral transfers until December 1 -- or later, if the principals of the sending and receiving schools give their assent.

[37] The Lynn Plan's definition of minority includes African Americans, Asian Americans, Hispanics, and Native Americans.

[38] The Plan originally called for a 10% range of deviation for elementary schools, but the district altered this range to 15%, as Birchenough explained, "to allow for the window to be open a little more" and thereby permit more choice to Lynn parents with elementary school children. A 20% range was considered in 1994, but the district ultimately concluded that this "would open the window too wide," with the result that schools would lapse into greater racial identifiability.

and middle or high schools with more than 68% minority students -- were designated as racially imbalanced. Conversely, an elementary school that was fewer than 43% minority or a middle or high school that was fewer than 48% minority would be considered "racially isolated."

A proposed transfer is desegregative -- always allowed, space permitting[39] -- when it would improve the racial balance of the sending or the receiving school. For example, a minority student may always transfer out of a racially imbalanced school ("School A") or into a racially isolated school ("School B"). Conversely, a white student may always transfer out of the racially isolated School B and into the racially imbalanced School A. A transfer is segregative, and never allowed, when it would exacerbate an already existing condition of racial imbalance in the sending or receiving school. A requested transfer that is neither desegregative nor segregative is "neutral" and conditionally allowable, as I explained above.

At a district level, white and nonwhite students are equally subject to the Plan; sometimes a white student may be denied a transfer, sometimes a nonwhite student. But at the individual level, there are times when, all else being equal, a student's ability to transfer turns on his or her race. To continue the above example, with School A as a racially imbalanced school and School B as a racially isolated school: A student who seeks a transfer from School A to School B may do so (again, space permitting) if he or she is a minority student. A white student requesting the same transfer, however, would not be eligible, unless she or he qualified for certain exceptions.

Such a student, denied a transfer because it would exacerbate racial imbalance in the system, may appeal the decision to the PIC's Director, who may occasionally refer the matter to or consult with the district

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[39] Factors such as limits on class size and space availability can result in denial of a transfer, but none of these are at issue in this case.

Superintendent. The appeals process is not an empty formality. The district will override transfer denials on appeal when the denial would result in siblings attending different schools or when parents can make a showing of medical, safety, or other extreme hardship.

Moreover, the PIC goes out of its way to make the appeals process accessible to everyone. It assists parents in preparing documentation required to establish hardship. It then arranges a meeting with the parents to discuss the student's options. If conditions at the destination school preclude the transfer, the PIC will present the student with alternative destination schools. Finally, the unique considerations posed by bi- and multiracial students have led Lynn to amend its Plan to permit parents to appeal the district's race designations directly to the Superintendent. Significantly, a number of the plaintiffs in this case have successfully invoked the appeals process.

The Plan's drafters also recognized that integration involves more than race-conscious school assignment policies, more than simply the mixing of students of different racial backgrounds. Thus, the Plan included substantial curricular innovations designed to ensure positive racial interaction; training and development of staff to address the challenges of teaching children of diverse backgrounds; programs that would create opportunities for positive interaction among students, school personnel and parents from different racial and ethnic groups, which are not normally found within regular school programming; integrated leadership opportunities and training to give students the skills necessary to deal effectively with racial tension and conflict, etc.

In addition, the Plan's drafters acknowledged that the improvements it sought could not be sustained in the long term unless all the schools were made attractive to all Lynn parents, whatever their race. Thus, the Plan included an ambitious construction program, largely funded by the state, to ensure sufficient space for out-of-

neighborhood transfers. It involved the development and standardization of curriculum so that there would be equal instructional opportunities across Lynn; development of indicators of performance and achievement for individual schools, programs and students; development of measures designed to improve school attendance; and creation of business/college partnerships with the schools to improve the quality of instruction.

D. Continuous Monitoring

The district's PIC oversees the ongoing implementation of the Lynn Plan. In effect, it is the vehicle through which the Plan administrators certify that the Plan is narrowly tailored to meet its goals.

Chief among the PIC's responsibilities is the processing of all admissions and re-admissions to the district and all transfers within the school system. It assesses students for special needs and maintains an ongoing database of each student's transfer history. That database, which features thirty-five data fields per student, enables Birchenough to monitor class size and enrollment by school, as well as the racial composition of individual schools and the district more generally.

The PIC prepares monthly reports tracking movements of students into and out of the district, as well as between the schools, to ascertain how many of these transfers qualify as desegregative. It provides regular reports to the state Department of Education on the progress and status of the district's magnet school programs, as well as the number of desegregative transfers.[40]

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[40] Finally, beyond the issue of desegregation, the PIC in effect maintains a living archive of the Lynn school district. Miscellaneous data that the PIC compiles and tracks include students' post-graduation plans, reasons for discipline, enrollment diversion to private and parochial schools, and indicators of student homelessness.

Significantly, the data that the PIC gathers enable it to continuously monitor the need for the Plan. The PIC tracks the patterns of Lynn residential segregation. It attempts to predict the choices of white or minority parents if there were no restrictions on transfers. Based on that data, Birchenough (and the defendants' experts) predicted that in a pure choice model, white parents would seek transfers to predominately white schools, and minority parents to minority schools.[41]

E. A Current Snapshot of the Lynn School District

1. Residential Segregation and Geographical Separation

According to McArdle's expert testimony, recent censuses and the data kept by the Lynn PIC reveal that Lynn remains geographically segregated by race. In the 1990s white populations continued to move to the northern -- and particularly northeastern -- areas of Lynn, while the concentration of racial minorities in south central Lynn expanded to consume all of southern Lynn and more of central Lynn, with a transition zone of racially mixed neighborhoods between these two enclaves. In addition, the elementary schools located in the predominantly white sections of Lynn and the elementary schools in the predominantly minority sections are separated by significant distances. The travel time between the two areas, whether by private car or public transportation, is not insubstantial.

2. "White Flight" and Its Decline after Implementation of the Lynn Plan

In 1979, before the Lynn Plan's implementation, when the city's schools were the most polarized, statistics show

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[41] Segregative transfers are sought between 500 and 800 times per year. White parents disproportionately seek transfers that the Plan forbids: although only about 40% of the student population is white, 70% of the segregative transfers proposed involve white students.

that the overall number of students in the Lynn public schools began to decline -- a direct result of the decline in white enrollment, what has been described as "white flight."

Significantly, after the Plan's implementation, this trend began to reverse. The number of students now enrolled in Lynn schools is similar to enrollment in the 1970s, just before the most significant increase in the number of minority students enrolled in the school system. While the percentage of Lynn students attending private and parochial schools rose as high as 17.4% in 1987, it has since declined dramatically to a low of 10% in 2001. Of the 15,444 students attending Lynn public schools in the 2001-2002 school year, 42% were white and 58% were nonwhite (15% African American, 29% Hispanic, and 14% Asian).

3. Racial Balance or Imbalance

There are presently twenty-five schools in the Lynn system -- eighteen elementary schools, four middle schools, and three high schools.[42] Under the Lynn Plan,

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[42] There are eighteen elementary schools in total: Aborn, Brickett, Callahan, Cobbet, Connery, Drewicz, Fallon, Ford, Harrington, Hood, Ingalls, Lynn Woods, Sewell-Anderson, Shoemaker, Sisson, Lincoln-Thomson, Tracy and Washington Community Magnet. Of these schools, five -- Aborn, Lynn Woods, Sewell-Anderson, Shoemaker and Sisson -- are located in predominately white residential areas of Lynn, whereas Cobbet, Connery, Harrington, Ingalls, and Washington are located in predominately minority areas.

Lynn maintains four middle schools, which provide sixth, seventh, and eighth grade instruction. Barring a student's voluntary exercise of a transfer, the middle schools act as neighborhood schools in their own right, drawing students from nearby elementary schools. The Brickett, Harrington, and Ingalls elementary schools, along with portions of the Aborn, Ford, and Hood schools, feed graduating students into the Marshall middle school. The Cobbet, Connery, and Washington elementary schools feed into the Fecteau-Leary middle school. The Breed middle school draws students from the Callahan, Drewicz, Fallon, Sewell-Anderson, Lincoln-Thomson and Tracy elementary schools. Finally, the Pickering middle school receives students from

"racially balanced" elementary schools in 2001-2002 had minority populations of between 43% and 73%; nine schools qualified.[43] Six schools were racially isolated.[44] Four elementary schools were "racially imbalanced."[45]

Under the Plan's stricter requirements for the middle and high schools, namely, a racial makeup falling within +/- 10% of the districtwide breakdowns, which in 2001-2002 translated into 48% and 68% minority enrollment to qualify as racially balanced, only one middle school of the four was racially balanced, while all three high schools met the test. The Breed middle school (49%) was racially balanced, while the Marshall (72%) and Fecteau-Leary (81%) middle schools were racially imbalanced, and Pickering (33%) was racially isolated. Lynn's high schools were all racially balanced with the following percentages: Lynn Classical (51%), English (51%) and Lynn Vocational Technical (63%).

4. The Special Problem of Poverty

Many of the city's resident families live at or near the poverty level, a situation that greatly complicates any school's educational mission. In the 2001-2002 school year, 65% of all Lynn students received free or reduced-cost lunch (eligibility for which is based on family income), including 40.7% of white students, 72% of the African American students, and 79.8% of the Asian

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Lynn Woods, Shoemaker, Sisson and portions of the Aborn, Ford, and Hood schools.

The four middle schools in turn feed into three high schools: Breed and Fecteau-Leary feed into the Lynn Classical high school, and Marshall and Pickering serve as feeder schools for the English high school. The third high school, Lynn Vocational Technical, draws from all parts of Lynn.

[43] Those schools included Lincoln-Thomson (43%), Sewell-Anderson (44%), Fallon (48%), Callahan (56%), Brickett (57%), Tracy (66%), Drewicz (68%), Washington (70%), and Ford (71%).

[44] Lynn Woods (25%), Sisson (27%), Shoemaker (30%), Aborn (35%), and Hood (just barely at 42%).

[45] Connery (80%), Ingalls (81%), Cobbet (83%), and Harrington (84%).

American students.[46] Fourteen of Lynn's eighteen elementary schools enroll a sufficient number of impoverished students to qualify for federal Title I assistance. Significantly, the four that do not receive assistance are the four most identifiably white schools.

5. School Construction and Renovation

Since the Plan was implemented, Lynn has been able to renovate and expand six of its elementary schools, for which the state provided 90% of the funding. Lynn is currently planning another phase of construction that would include renovations to existing facilities and the construction of two new middle schools and two or three elementary schools. Elimination of Lynn's restrictions on segregative transfers would render this project ineligible for 90% funding under the RIA.

6. "Magnet" Schools

Of the ten magnet programs envisioned in early iterations of the Plan, only seven were ultimately developed. The district added two more programs in September 1999. However, the term "magnet school" in this setting needs to be clarified. It does not connote a competitive admissions process or the provision of a more elite education. See infra note 72.

Lynn's "magnets" differ from its other schools only insofar as they have adopted certain "educational themes." The magnet themes currently include "Brickett by the Sea," "Reading and Writing Literary and Whole Language," "Technology and Language/Citizenship Skills for the Future," "Life Science," "Rainbow Connection Society," "User Friendly Society," "Pickering After School Support," and "Healthy Schools Make Healthy Communities."

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[46] Birchenough testified that at the high school level, students are often ashamed to fill out the paperwork necessary to obtain school lunch assistance, so that the numbers may under-represent the numbers of families who could qualify.

While the schools offer and provide varying academic programs, which are designed to draw students from other neighborhoods elsewhere in Lynn in order to further the integration effort, the parties stipulate that "the education provided . . . in each of the elementary, middle, and high schools in Lynn is comparable in quality, resources, and curriculum."

F. The Lynn Schools at Present

By all accounts, and by all measures, since the implementation of the Plan the Lynn schools have become a success story. That success was recounted in the moving testimony of the participants, in expert testimony, and in the data.

The defendants have identified certain compelling interests to justify the Plan: First, to prevent racial isolation; second, to promote racial and ethnic diversity; third, to increase educational opportunities for all students and to improve the quality of education[47]; fourth,

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[47] There is no question that educational achievement has increased throughout the system by all measures. For example, to the extent that the state-administered MCAS test is a barometer of academic achievement, Lynn students are performing at high levels relative to other students in the Commonwealth under similar socioeconomic conditions. Likewise, Lynn's high school students scored above average among MCAS test-takers in urban areas. In addition to the improvement reflected in MCAS test results, data collected in the first three years after the Lynn Plan was implemented show improved reading and test scores. The Massachusetts Department of Revenue, as part of its financial audit of Lynn schools, collected school achievement data from 1988 to 1996 that reflected sustained improvement in reading, language expression, and overall academic achievement.

Nevertheless, defendants do not claim that this improvement derives solely from the race-conscious aspects of the Lynn Plan. As described above, from the outset the student assignment plan has been seen as an integral part of a larger, more comprehensive educational overhaul that involves improving school facilities, increasing resources, improving curricular offerings, as well as providing a wide variety of multicultural and multiracial educational opportunities.

to provide a sufficient education by state constitutional standards; fifth, to ensure the safety of Lynn's public school students; and sixth, to implement the clear command of the Supreme Court's decision in Brown v. Board of Education.

1. Observations by Participants

Since the Plan has been in place, Lynn school superintendent Nicholas Kostan has observed a "steady progression" of improvement in the schools. Racial tensions have subsided, attendance and test scores have increased, and suspensions of students have declined. Indeed, according to Kostan, Lynn's school attendance rates are remarkable for an urban school district. He attributed this attendance record to the Lynn Plan, which he believes has cultivated feelings of comfort and safety among Lynn students that make them want to go to school. He has also noticed that students no longer self-segregate by race in their social interactions, which he believes is also a result of the Lynn Plan.[48]

Patricia Mallett, a teacher at the Brickett elementary school, testified that since the Lynn Plan's implementation, she has witnessed a stunning improvement in student race relations at Brickett. Prior to the Plan, she observed self-segregation and racial

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What the defendants do allege, and what the record establishes, is that the race-conscious and race-neutral components of the Plan are inextricably intertwined and each independently necessary. The school assignment policy, without the support of the other elements, would not have resulted in these improvements. Conversely, race-neutral strategies would not have been effective in creating a healthy multiracial learning environment without the Plan's use of race.

[48] Nicole Oak, a seventeen-year-old white student and recent graduate of Lynn Classical High School, started her Lynn career in a "very diverse" elementary school, with the result that multiracial environments seemed "just natural" to her by the time she graduated from high school. In her experience, students from other school districts do not have the same healthy attitude toward racial difference; she suspects that hers is a result of her early exposure to students of other races.

tension in Brickett, a predominantly white school. Now, students of different races seek out one another and form friendships, a result she attributes to the Plan's fostering of cross-racial interaction in the crucial formative years.[49]

2. Expert Testimony

The expert testimony in this case corroborated the moving observations of the teachers, students, and administrators who testified on behalf of the district. McArdle and Drs. Orfield, Dovidio, and Killen together gave an internally consistent, multidisciplinary presentation that convincingly explained how essential the Lynn Plan's use of race in school assignment was to the school district's renaissance.

Broadly speaking, the expert presentation was compelling for three reasons:

First, Lynn's experts based their opinions on their considerable expertise and a tremendous amount of data -- the lion's share of it personally obtained -- specific to the conditions in Lynn. Nancy McArdle, the defendants' demographics expert, performed a comprehensive study of demographic trends in Lynn. School desegregation expert Dr. Gary Orfield put the resources of the prestigious Harvard Civil Rights Project into his study of Lynn. Dr. Orfield oversaw the administration of the Harvard Project's standard data-gathering questionnaire ("Diversity Assessment Questionnaire") eleventh grade students from all three of Lynn's high schools. The 72-question survey, jointly designed by leading experts on

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[49] Karen Horner, an African American parent of two children in the Lynn system, testified that she did not begrudge the district's denial of two transfers she sought on behalf of her son Errol. Although the denied transfers would have made her life as a single parent substantially easier -- she preferred one school because the YMCA maintained an after-school program across the street and the other because she had recently moved into that school's neighborhood -- Horner respected the district's decisions.

school desegregation,[50] is used to compare the success of desegregation efforts nationwide. Dr. Orfield followed up his survey with a visit to Lynn Classical High School in January 2002, where he met and spoke extensively with a number of leaders of student organizations.

In January and February 2002 Dr. Dovidio visited the Lynn school system, conducted formal and informal interviews with teachers and administrators, reviewed what he called "archival evidence" -- newspapers, yearbooks, student-made decorations, school mission statements -- and observed the students in the classrooms, between classes, at lunch, and before and after school. Dr. Killen also visited the Lynn system independently of Dr. Dovidio. Dr. Killen sought out schools with a range of racial homogeneity and heterogeneity. With the students she deployed observational and interview methodologies standard in her field of developmental psychology. Dr. Killen then supplemented her findings with more formal interviews with teachers and administrators. Drs. Dovidio and Killen also reviewed Lynn student responses to the Harvard questionnaires.

Second, the experts looked at the data that they gathered from the distinct methodological perspectives of their fields of expertise. Dr. Orfield, a desegregation expert, considered the whole picture -- the survey data and his own observations as well as those of the other experts -- and situated Lynn's experience in his broader experience with the many school systems he had studied. Drs. Killen and Dovidio, a developmental and social psychologist, respectivly, viewed the data through the lens of their expertise: social and cognitive development, intergroup contact and racial stereotyping. McArdle, the demographer, analyzed data about residential and school segregation.

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[50] The survey instrument was designed by nationally recognized experts and peer-reviewed. It has been administered at locations across the country.

Third, the defense experts were nationally renowned experts who could cite with authority the studies in their field and who used accepted methodologies and based them on opinions published findings in peer-reviewed journals. I found each of them to be credible and extremely persuasive.

a. Dr. Orfield: Desegregation Expert

Under Dr. Orfield's supervision, the Harvard Project analyzed the survey returns and concluded that Lynn is

> a school district where all groups of students have experienced ability to work together, to share issues, to discuss across racial and ethnic lines, feel comfort -- feel that they are prepared to live and work in interracial communities, feel prepared to work under the supervision of somebody of another racial group, have worked on projects across racial lines in their classes, feel comfortable in discussing issues across racial lines.[51]

Dr. Orfield testified that the survey's conclusions about the Lynn experience neatly align with the underlying theory of a new area of desegregation research: that benefits accrue to all children, not just minority children, as a result of school integration. Dr. Orfield cited several peer-reviewed studies -- and referred to a number of other studies on their way to publication -- finding that parents and students in areas where integration has been achieved (as it has in Lynn) acknowledge that side-by-side learning with students of other races confers substantial citizenship benefits on all students. If schools implement desegregation programs with supportive

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[51] The students that Dr. Orfield consulted about race relations and the nature and degree of cross-racial interaction among the students affirmed the survey results. Student responses were unequivocally positive, to such an extent that they pitied students in adjoining communities who did not have the benefit of integrated schools and regarded them as "completely clueless" about race relations.

elements, such as training of teachers, and the schools are committed to creating a positive supportive atmosphere, all students obtain "benefits to the way of thinking, understanding of the society, [and] ability to function in society," as well as gains in academic achievement across the board.[52] Relying in part on McArdle's demographic data, Dr. Orfield also testified that the Lynn Plan used race no more than was necessary to allow Lynn to meet its educational goal of preparing students to live in a multiracial society. He observed that the Plan's specified range of racial balance -- for elementary schools, within 15% of the overall proportions of white and nonwhite students in the district, and for middle and high schools, within 10% -- was typical of desegregation planning. In fact, Dr. Orfield found the range perhaps more flexible and accommodating to the interests of parents than he might have chosen: he said he "probably would have chosen 10%."

Finally, Dr. Orfield testified about the likely impact of the resegregation of Lynn's schools. He cited research on African American and Latino children concluding that educating students in racially isolated or segregated school environments has an adverse impact on school attendance and performance, with long-term consequences. Poverty exacerbates racial isolation and segregation for minority students. When schools that are already in areas with an overwhelming minority

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[52] For example, data from the survey of Lynn's eleventh grade students suggest the following: students across racial lines felt that they had received information about college admissions and have been encouraged by teachers and counselors to attend college and to take honors or Advanced Placement courses, and that they have at least one teacher who takes a special interest in them. Consistently, students across racial groups reported their convictions that teachers administer discipline fairly and that if they "try hard they can do well in school."

Students felt that integration was a fundamental characteristic of their schools. It was part of the schools' mission statement and was reflected in the conduct of authority figures.

residential population and extreme poverty resegregate, racial polarization is accelerated, with all of its deleterious effects.

Significantly, resegregation would have a substantial impact on white students in Lynn as well. Based not only on his research, but on the studies and research of other nationally known experts, Orfield opined that, as a result of racial isolation and segregation, these students forfeit the opportunity to learn from other groups and are less prepared to handle interracial settings as an adult, conclusions underscored by the testimony of Drs. Killen and Dovidio.

b. Drs. Dovidio and Killen: Social and Developmental Psychologist, Respectively.

Drs. John Dovidio and Melanie Killen, a social and developmental psychologist, respectively, gave psychological content to Dr. Orfield's conclusions. Dr. Killen testified that because racial (and certain ethnic) differences are observable, children key on them early in their social development. Differences that are visibly apparent to young children have deeper resonance with them. As a consequence of this early attendance to observable difference, stereotypes about race and (visible) ethnicity set in early and are extremely difficult to correct in adolescence and adulthood. Dr. Dovidio agreed that children attend more readily to racial distinctions than other differences.

Furthermore, Dr. Killen testified that the setting of stereotypes is harmful to all children. Students on the receiving end of stereotypical assumptions feel stigmatized in ways that compromise their academic prospects. Students who harbor stereotypes suffer as well: their reliance on stereotypes inhibits their ability to make individualized judgments when they interact with students of other races. As a result, even students who are not themselves the objects of negative stereotypes are

nonetheless impaired in their ability to live in an interracial society.

Stereotypes do not as easily take hold of children who interact early and often with children of other racial and ethnic groups. The personal connections forged between students of disparate racial backgrounds challenge race-based assumptions they might otherwise develop about one another. It is Dr. Killen's experience that children in heterogeneous environments understand better why it is wrong to judge or exclude others based on their race.

Both Drs. Killen and Dovidio testified that meaningful interracial exposure must occur early. Dr. Dovidio described racial stereotyping as a "habit of mind" that is difficult to break once it forms. It is more difficult to teach racial tolerance to college-age students; the time to do it is when the students are still young, before they are locked into racialized thinking. For her part, Dr. Killen cited studies showing that students begin to form rigid social cliques around the sixth and seventh grades, and that race can be a dominant factor that governs who joins what clique. Once students have found their cliques, the opportunity to defeat racial stereotypes with crossracial interaction is lost.

(1) Intergroup Contact Theory

Drs. Killen and Dovidio both attributed the turnaround in race relations in Lynn -- and the overall preparedness of Lynn's students to live in a multiracial society -- to the district's successful implementation, through the Lynn Plan, of "intergroup contact." Intergroup contact theory is a 50-year-old prescriptive theory of race relations with volumes of support in the literature on social science, including social and developmental psychology. The theory holds that under certain conditions, interaction between students of different races promotes empathy, understanding, positive racial attitudes and the disarming of stereotypes. The four necessary conditions are (1) equal status between or among different racial groups; (2) authority

support for interactions between members of the groups (that is, teachers and staff who advocate and facilitate the contact); (3) common goals and cooperative activities; and (4) opportunities for personalized contact to disrupt stereotypes.

Drs. Dovidio and Killen testified, based on their personal, independent observations, that Lynn schools amply satisfied all four of these conditions and that the positive racial climate in Lynn was directly attributable to intergroup contact. Both expressed amazement at how ideal the conditions in Lynn's schools were for learning racial tolerance and concord. Dr. Killen found that this was true of all the schools she visited in Lynn: racial environments were "uniformly positive," and she noted that "it wasn't the case that one school really stood out as being . . . seriously troubled, tough, problematic."[52]

(2) "Critical Mass"

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[53] Dr. Killen's testimony was especially telling:

> I was very struck. I was very surprised, because I went there really with no expectation. . . . And I went there just wanting to find out what it was going to be like. And I've been in numerous, numerous schools in . . . different places in the United States. And I was really surprised by the high level of positive interaction among children, among teachers and children in these schools. I mean, I was really struck by this. It was kind of astounding, especially in the informal settings, but also in the classrooms, as well. But in the informal settings, of seeing children sitting next to one another from different races, interacting together in positive ways, seeing the teachers in the hallways in terms of their warmth expressed to children and the nurturing behavior to all children, different races.
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> * * *
>
> [O]ne of the well-documented findings is that children in cafeteria settings often self-segregate. They sit next to others who are of the same race and ethnicity, ungendered. And I did not see that . . . . It was very surprising. They elected to sit next to others from different races, different ethnic backgrounds, positive interactions, positive discourse style, positive emotional display, affect display.

Drs. Killen and Dovidio alike testified that racial balance within the schools is necessary and crucial to obtain the benefits of intergroup contact that they observed in such abundance at Lynn. Simply put, unless there is a "critical mass" of white and nonwhite students in a given school, the efforts of schools to promote racial harmony lose much of their force. Such efforts are still desirable, Dr. Killen explained, but they lack significance and relevance in a school that is racially isolated or imbalanced. There is no "magical number," in Dr. Killen's experience, that indicates a critical mass, but she cited studies describing a 20% figure below which members of a racial minority in a given setting feel isolated or stigmatized. Dr. Dovidio underscored a critical mass estimate of 20% -- a number well-established in the literature and affirmed in his own research as a prerequisite to making a meaningful amount of intergroup contact possible.[54]

Dr. Killen took pains to emphasize that 20% is not a magical shut-off point for gains from intergroup contact. The gains occur along a continuum: as the racial composition of school populations creeps closer to balanced, racial stereotyping and tension is reduced and racial harmony and understanding increases. For example, the Fecteau-Leary middle school that Dr. Killen visited had a white population of just below 20% at the time. Dr. Killen explained that Fecteau-Leary had very recently exceeded a 20% white share and that many of the elementary schools feeding into it were racially balanced in their own right.[55]

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[54] Drs. Dovidio and Killen both summarized the research and cited specific authoritative studies on critical mass.

[55] Dr. Dovidio explained further that even though schools may occasionally dip under the 20% mark, as Fecteau-Leary did, the range of racial balance in Lynn's schools does not permit a statistically meaningful study of the relative ability of the schools to teach racial tolerance. Such a study, which the plaintiffs proposed to Dr. Dovidio on cross examination, might in theory provide a measure of the contribution that student-body integration (as opposed to the other

(3) Impact of Resegregation

Both Drs. Killen and Dovidio were convinced that reversion to a de facto segregated system would forfeit the gains that Lynn has made. In fact, Dr. Dovidio noted, even when students in racially imbalanced schools receive the same instruction, skills, and training, they are "likely actually to have more racial incidents and racial problems" absent that critical mass of white or nonwhite students.

c. Nancy McArdle: Limitations Imposed by the Demographics in Lynn

Just as critical mass is a precondition to achieving the benefits of intergroup contact, the defense experts agree that the Lynn Plan's race-conscious student assignment policies are necessary to ensure that white and nonwhite populations in its schools reach that critical mass. Demographics expert Nancy McArdle projected that Lynn's predominantly white residential areas will remain so in the coming five to ten years. Predominantly minority tracts in south central Lynn will become still more racially identifiable. The minority share of the population will increase in the mixed area between south central Lynn and the white dominated northeast portion of the city. Return to a strict no-transfer neighborhood school system would bring a number of schools below critical mass. For example, a neighborhood system would take the Lynn Woods school from 24% to 8% minority, Shoemaker from 30% to 6% minority, Aborn from 35% to 12% minority, Cobbet from 83% to 86% minority, and Connery from 80% to 87%. In McArdle's assessment, if Lynn were to abandon its existing student assignment plan and return to a system of strict neighborhood school

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"inputs" provided for in the Plan) has made to the improvement in student attitudes about race. But because the Lynn Plan has ensured that all its schools at least hover around the 20% mark, the range of racial balance available for study is too narrow to admit of a manageable analysis.

enrollment -- no transfers allowed -- the city's schools would immediately assume a high level of de facto racial segregation.

Birchenough added that the district has considered and even tried to implement a variety of race-neutral methods to achieve the same measure of integration but rejected them all as not feasible. She testified that the present condition of residential segregation in Lynn is such that a redrawing of school attendance zones could not meaningfully alleviate the de facto segregation that a neighborhood school system would bring. The areas that would need the most attention, the racial enclaves in northeast and south central Lynn, are simply too far removed from one another. Because statistics show that white parents tend to request transfers to identifiably white schools and minority parents tend to prefer transfers to predominantly minority schools -- the district in fact denies 500 to 800 requested segregative transfers per year -- a system that allowed unfettered school choice would exacerbate segregation. See also infra Section V.B.4.b(3).

d. Plaintiffs' Rebuttal

The plaintiffs stipulate to the improvements in the Lynn school system since implementation of the Plan. Likewise, they do not dispute that Lynn meets the four conditions of intergroup contact. What the plaintiffs dispute, through their expert, Dr. Rossell, is (1) the extent to which a race-neutral plan would have accomplished the same result and (2) the extent to which a certain percentage of white or minority students is required in a school before the benefits of intergroup contact can obtain.

Dr. Rossell's testimony was not credible. As noted above, unlike defendants' experts, she did no independent investigation of the conditions in Lynn. She made sweeping conclusions without reviewing demographic or socioeconomic data and without having an accurate understanding of the Plan itself.

Her testimony was based on her experience with other systems and her memory of the Plan from her work fifteen years earlier. Significantly, her report was based on a fundamental misunderstanding of the Plan, which she characterized as a "controlled choice" plan. Lynn's Plan in fact differs considerably from controlled choice. Controlled choice authorizes the mandatory reassignment of students from one school to another in the event that parents' exercise of choice does not generate enough racial balance; likewise, controlled choice does not guarantee that students can attend their neighborhood schools.

Dr. Rossell treated Lynn's student assignment policy as a controlled choice plan based on her experience in Lynn as a paid desegregation consultant to the City in 1987. She admitted that she believed until just prior to her testimony that the Lynn Plan incorporated provisions for mandatory reassignments from neighborhood schools.

This was never the case. A draft of the Plan subsequent to the one Dr. Rossell saw in 1987 excised the provisions for mandatory reassignments, and before the Plan's implementation in 1989 the Plan guaranteed Lynn students without exception the right to attend their neighborhood schools.

In addition, Dr. Rossell's about-face on crucial issues is troubling here. She was a supporter of the Plan when she was the city's paid expert, and when the draft Plan involved provisions far more intrusive than are at issue here. In the instant litigation, retained by a different party, she testified to precisely the opposite conclusions. Specifically, in this case, she challenged the concept of a critical mass, although in her earlier work, she was on record as having embraced it.[56] While Dr. Rossell

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[56] A 1983 publication entitled Strategies for Effective Desegregation, to which Dr. Rossell made substantial contributions, declared that "A critical mass of between 15 to 20% of any particular racial group should be maintained in a school" and that "A critical mass of students seems to encourage intergroup contact, discourage self-isolation,

concedes that some measure of racial heterogeneity in the schools is a precondition to intergroup contact, she now takes the position that the schools in Lynn would meet that minimum, even under a neighborhood system -- a conclusion that every one of defendants' experts rejects. Indeed, she testified that there is research to suggest that racial isolation can somehow facilitate the equal status contact that is a crucial element of intergroup contact, as racial groups of equal size might be more competitive with one another.

Her testimony is unpersuasive on a number of fronts. First, Dr. Rossell does not work in the fields in which the studies cited by Dovidio and Killen were generated. She is not a social psychologist; she has no background in developmental psychology, the study of adolescent behavior, or the cognitive and social development of children.

Second, Dr. Rossell's position that there is "no research" supporting the critical mass concept is flatly contradicted by the testimony of the nationally known defense experts equipped with years of expertise in their fields, an armful of social science literature, including in social and developmental psychology literature on both critical mass and intergroup contact, and their extensive firsthand observations of the conditions in the Lynn schools.

Third, it appears that Dr. Rossell's characterization of the field is skewed. Her insistence that there is "no research" whatsoever supporting the concept of critical mass conveyed, in essence, that she does not accept the validity of the studies cited in bulk by Drs. Dovidio and Killen -- namely, studies in social and developmental psychology. It is Dr. Rossell's position that unless the

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facilitate the responsiveness of teachers and administrators to the special needs of minorities, . . . and promote more parental involvement in the school." When confronted with this work at trial, Dr. Rossell claimed that these conclusions were based on no studies whatsoever, but were pulled in effect, out of thin air.

defense experts' conclusions are buttressed by statistical studies of the kind she conducts (in particular, multiple regression analyses), they are unacceptable. I am not willing to jettison the considered judgments of the entire fields of social and developmental psychology and the nationally known experts within them.

Finally, taking a position diametrically opposed to Dr. Dovidio's, she stated that the experts could, for example, have surveyed schools with differing degrees of racial balance and determined the extent to which students at more balanced schools evinced healthier attitudes about race than their peers at less balanced schools. Dr. Dovidio suggested that such a study was impossible in Lynn because of the small numbers of schools that are racially imbalanced and the marginal differences among them. Moreover, Dr. Rossell testified that this "multiple regression analysis" could realistically control for race-neutral variables in the schools, including the schools' different extracurricular programs, the relative poverty level of students, the extent to which different teachers have different levels of experience in cooperative learning. But Dr. Rossell did not conduct this analysis herself. No other expert in this case believed that such a study could be done, or that it had to be done, given the weight of the scholarly literature.

Finally, Dr. Rossell catalogued race-neutral alternatives that are available to Lynn -- e.g., a transfer program that would permit any requested transfer (to a school with space) with continued use of magnet schools remaining an option. Dr. Rossell explained that Connecticut schools have created racial diversity by providing race-neutral magnet school programs. But whether the race-neutral alternatives she cited would work in Lynn was an opinion which Dr. Rossell was in no position to give -- she had not reviewed the demographics of Lynn or studied the school system in recent years, and she fundamentally misunderstood the nature of the Plan.

V. LEGAL ANALYSIS

A. Jurisdictional Issues

1. Amendments to Prior Decisions (Comfort Plaintiffs)

Federal Rule of Civil Procedure 12(h)(3) authorizes, and in fact requires, a court to raise (or, as in this case, to revisit) a jurisdictional issue sua sponte. Comfort, 150 F. Supp. 2d at 294 n.23 (citing Rule 12(h)(3)).[57] Although it does not affect the substance of the matters litigated, for clarity's sake I take this opportunity to amend certain jurisdictional findings.

This Court earlier dismissed the Comfort plaintiffs' actions for declaratory relief against the Commonwealth of Massachusetts as barred by the Eleventh Amendment. Comfort, 131 F. Supp. 2d at 256. The decision to dismiss these claims was correct, but a clarification should be made. The Eleventh Amendment precludes suit for damages only; a suit for prospective relief, including declaratory relief, is permissible when brought against state officials (but not against the state itself).[58] Mills v. Maine, 118 F. 3d 37, 54 (1st. Cir. 1997); see also Ameritech Corp. v. McCann, 297 F.3d 582, 587 (7th Cir. 2002) (finding that a declaratory judgment claim is "prospective" and therefore, under Ex Parte Young, 209 U.S. 123 (1908), not subject to the Eleventh Amendment).

In a subsequent decision, I concluded that the Comfort plaintiffs lacked standing to sue the Lynn defendants for prospective relief, but I did allow them to sue for a declaration that the initial application of the Plan violated their rights. Comfort, 150 F. Supp. 2d at 302. I now find that holding was incorrect. In Berner v. Delahanty, 129 F.3d 20 (1st Cir. 1997), the court held

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[57] Because standing is an element of the constitutional requirement of "case or controversy," U.S. Const. art. III, lack of standing deprives a court of subject-matter jurisdiction. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101-02 (1998).

[58] Thus, the Eleventh Amendment does not bar the Bollen plaintiffs' declaratory claims against state Board of Education members.

that a claim under the Declaratory Judgment Act is not sustainable absent a showing of "actual or imminent, not conjectural or hypothetical" harm. Id. at 24 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks omitted)). If a plaintiff lacks standing for injunctive relief, he or she lacks standing to bring declaratory relief claims as well. Thus, the Comfort plaintiffs' declaratory claims against the Lynn defendants and the state defendants are dismissed in their entirety.

Ultimately these clarifications do not affect the substance of the lawsuit. With nominal damages at stake, the parties amply litigated all of the constitutional questions brought before the Court in the complaint.[59]

2. Partial Motion to Dismiss (Bollen Plaintiffs)

After the trial, defendants filed a partial motion to dismiss certain of the Bollen plaintiffs' claims on standing grounds. This motion is granted in part and denied in part.[60]

a. Claims for Injunctive and Declaratory Relief

Four of the Bollen plaintiffs, Todd and Laura Bollen,[61] Leanne Manuel,[62] and Karen Tsaltas,[63] have stipulated

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[59] In addition, as described below, at least one plaintiff has standing to bring all claims.

[60] The plaintiffs argue that the defendants' motion makes improper reference to trial testimony and stipulations. A jurisdictional motion, however, unlike a Rule 12(b)(6) motion to dismiss, may incorporate evidentiary materials outside the pleadings, and the court may consider arguments beyond the scope of the parties' memoranda and resolve factual disputes. See Booker v. United States, 16 F. Supp. 2d 52, 58 (D. Mass. 1998).

[61] The Bollens brought suit on behalf of their son Michael, a white student, for whom they sought a transfer from his neighborhood middle school, the Marshall middle school, to the Pickering middle school. Lynn denied his request but approved Bollen's alternative request for a desegregative transfer to the Fecteau-Leary middle school. Indeed, when in the spring of 2001, consistent with an

that they are satisfied with their existing school placements. Since it is at best speculative, and at worst unlikely, that these plaintiffs will request segregative transfers for their children in the future, they lack standing to seek an injunction.[64]

I make a similar finding with respect to plaintiff Meta Stinson.[65] Although Stinson's daughter is presently registered with the district as white, she is in fact

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agreement in the Bollen case, the district offered Bollen an assignment to any school of his choice; Bollen elected to remain at Fecteau-Leary, where he enrolled for the 2001-2002 school year.

[63] LeAnne Manuel's daughter Shanice left her neighborhood school to attend Connery Elementary through the third grade. In September 1999, Manuel sought a second transfer, this time to the Sewell-Anderson school. Lynn denied this transfer and Manuel did not present a compelling reason for the re-assignment. When the Bollen agreement allowed Manuel her choice of schools within the school district, she initially favored Sewell-Anderson but then changed her request to the Callahan elementary school. Significantly, Shanice's ultimate transfer to Callahan was race-neutral and would have been passable under the Plan, quite apart from the Bollen agreement.

[63] Karen Tsaltas sues on behalf of her son Michael, who attended his neighborhood school, the Harrington elementary school, through the fifth grade. At the beginning of Michael's fourth grade year, Tsaltas requested a transfer to the Washington elementary school. Lynn initially denied Tsaltas' request but reversed its position on appeal. Tsaltas, however, ultimately did not transfer her son to that school, choosing instead to keep her son at Harrington.

[64] For a more extensive description of the principles of standing, see Comfort, 150 F. Supp. 2d at 285, 296-297 (citing Lujan, 504 U.S. at 564 (finding that standing cannot be predicated on a plaintiff's "one day intentions")).

[65] See supra Section III.A (setting forth the particulars of Stinson's transfer denial). Although Stinson was advised of her right to appeal this decision, she did not do so, giving her assent instead to her daughter's continued placement at Sewell-Anderson, which, though an elementary school, had recently decided to continue sixth grade instruction for another year. Pursuant to the Bollen agreement, Stinson placed her daughter at Pickering for the 2001-2002 school year.

biracial, and therefore eligible under the Plan for essentially any transfer her mother might seek.[66]

Just as the Comfort plaintiffs did, the Bollen plaintiffs attempt to characterize their harm not as the race-based denial of a transfer, but as the denial of the ability to compete on equal terms for school transfers. See Comfort, 150 F. Supp. 2d at 296. The right to compete on equal terms is well-recognized as a passable, cognizable interest for standing purposes in cases involving a race-conscious government action. Donahue v. City of Boston, 304 F.3d 110, 119 (1st Cir. 2002) (citing Texas v. Lesage, 528 U.S. 18, 21 (1999)); Comfort, 150 F. Supp. 2d at 296 (citing Lesage and Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280-81 n.14 (1978)).

The flaw in the plaintiffs' argument is that they can show no imminent "competition." Such disadvantage, if it even exists,[67] is speculative where it is not clear that the plaintiffs will again expose themselves to the race-conscious elements of the Plan by seeking transfers in the future. See id. Accordingly, the claims of these plaintiffs for declaratory and injunctive relief are dismissed for lack of subject-matter jurisdiction.

However, the defendants concede that one plaintiff, Gina Leone, who sues on behalf of her son Troy LaMothe, has standing to pursue prospective relief. On March 24, 2000, Leone requested to transfer her son from Ingalls, his neighborhood elementary school, to Aborn. The district denied the transfer. Leone received no relief on appeal, which confirmed that the proposed transfer was segregative and concluded that she did not merit a hardship exception. Pursuant to the agreement of counsel

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[66] The Plan's safeguards for biracial students ensure that Lynn will not deny a transfer to Stinson's daughter, if she follows the appeals procedures in place.

[67] Indeed, as I discuss below, whether the denial of a transfer ever can be said to work a "competitive disadvantage" injury is another question altogether, when the parties have stipulated that all of Lynn's public schools are equal in quality.

in the Bollen case, Leone was informed that her son could attend any school of her choice for the school year of 2001-2002. Leone chose the Aborn school, to which he otherwise would have been unable to transfer under the Lynn Plan.

b. Nominal Damages

Nominal damages are another matter. The defendants argue that Stinson and Karen Tsaltas have no standing to sue even for nominal damages.[68] Tsaltas's son was denied a transfer, but that denial was reversed on appeal. Stinson, pleased with the alternative assignment that the district offered, never appealed the denial of her daughter's transfer.

I find that all of the Bollen plaintiffs, including Stinson and Tsaltas, can seek nominal damages, where the threshold for relief is lower.[69] Stinson and Tsaltas's transfer requests were both at least initially denied pursuant to the race-conscious elements of the Lynn Plan. Since I held that Samantha Comfort could pursue nominal damages notwithstanding her successful appeal, the same must be true for Tsaltas despite her appeal, and certainly for Stinson, who did not appeal. The Motion to Dismiss on the issue of nominal damages is denied.

B. Equal Protection

The plaintiffs challenge the RIA on its face and as applied in the Lynn Plan under the Equal Protection Clause of the Fourteenth Amendment. They urge the Court to evaluate the Act and the Plan by the standard of "strict scrutiny." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a

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[68] I earlier held provisionally that the Comfort plaintiffs could seek nominal damages. Comfort, 150 F. Supp. 2d at 301-02.

[69] For an extended discussion of the availability of nominal damages, see Comfort, 150 F. Supp. 2d at 298-30.

reviewing court under strict scrutiny."); Wessmann, 160 F.3d at 794. Under strict scrutiny, a racial classification is unconstitutional unless its proponent can establish, first, that the policy furthers a compelling state interest, and second, that it is narrowly tailored to achieve that interest. Adarand, 515 U.S. at 227. The burden of proving a compelling interest and narrow tailoring rests on the defendant. Keyes v. School Dist. No. 1, Denver, Colorado, 413 U.S. 189, 209 (1973).

As I discuss below, courts have used a different level of scrutiny, namely "intermediate scrutiny," for policies that are race-conscious but do not classify, i.e., prefer, members of one race over another. See, e.g., Jacobson v. Cincinnati Bd. of Education, 961 F.2d 100, 102 (6th Cir. 1992); Kromnick v. School Dist., 739 F.2d 894, 902-03 (3d Cir. 1984). This test requires the government to show that the policy serves "important government objectives" to which the means chosen are "substantially related." United States v. Virginia, 518 U.S. 515, 533 (1996) (citations omitted). Amicus filings in this case argue that I should apply intermediate scrutiny to the Lynn Plan, whereas the parties prepared and argued their cases on the assumption that the Plan is subject to strict scrutiny.

1. Strict or Intermediate Scrutiny?

Amici propose that I apply intermediate scrutiny to the Lynn Plan and the RIA because neither makes a racial classification in the sense of preferring the interests of one race over another. That is, while in Adarand the Court subjected a racial classification to strict scrutiny, the mere consideration of race, where no preference is given to members of one race over another, is distinguishable.

The Adarand Court confronted a federal policy that gave financial incentives to contractors on government projects to subcontract their work to small businesses certified as controlled by "social or economically disadvantaged" individuals. The policy presumptively designated racial minorities as "socially disadvantaged."

Adarand, 515 U.S. at 205-07. Adarand Constructors, Inc., which was not so certified, did not get a subcontract despite its low bid.[70]

The Court held similarly in other cases involving the use of race to prefer minorities for other benefits of limited availability, i.e., statutory incentives to government contractors to favor minorities, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989); racial preferences in the hiring and promotion of government workers, United States v. Paradise, 480 U.S. 149, 153 (1987); and redistricting efforts directed at carving out enclaves of minority voters, e.g., Bush v. Vera, 517 U.S. 952, 965-67 (1996); Miller v. Johnson, 515 U.S. 900, 904 (1995).

In contrast, courts including the First Circuit have held that where differential treatment does not favor members of one race over another, there is no racial classification, Adarand is inapposite, and strict scrutiny does not apply. See, e.g., Raso v. Lago, 135 F.3d 11, 16 (1st Cir. 1998) ("The term [racial classification] normally refers to a governmental standard, preferentially favorable to one race or another, for the distribution of benefits.");[71] cf. Wessmann, 160 F.3d at 794 (quoting

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[70] The Court remanded the case to determine if the federal policy satisfied strict scrutiny. After numerous further appeals and remands, the then-current program was found to meet "strict scrutiny." Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1187 (10th Cir. 2000)(holding that "the relevant programs now meet the requirements of narrow tailoring").

[71] Raso involved the redevelopment of portions of the predominantly white Old West End in Boston. The Boston Redevelopment Authority ("BRA") required the developer to give preference to displaced prior residents (mostly white) in leasing the redeveloped premises. The developer, in turn, sought funding from the federal Department of Housing and Urban Development ("HUD"), which was operating at the time under a consent decree that required it to press for "the achievement of a racial composition, in HUD-assisted housing located in neighborhoods which are predominantly white, which reflects the racial composition of the City [of Boston] as a whole." Raso, 135 F.3d at 14 (alteration in original). HUD, the BRA, and the developer

Adarand's requirement that "a government 'must justify any racial classification subjecting [a] person to unequal treatment under the strictest judicial scrutiny'" (emphasis added) (alteration in original)).

Amici point out that in the present case, the evidence shows that each Lynn school provides equal educational opportunities to students. Indeed, the parties even stipulate, "the education provided to Lynn's regular education students in each of the elementary, middle, and high schools in Lynn is comparable ... quality, resources, and curriculum, even though schools do offer and provide varying academic programs."[72] Thus, this is not a case, as

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drafted a plan that reduced the number of units subject to the displaced resident preference. A class of Old West End residents challenged the result under the Equal Protection Clause, citing the plan's racial motive of integrated housing.

The First Circuit affirmed the district court's dismissal of the case, rejecting the strict scrutiny test. The court held that a mere "racial motive" does not raise equal protection concerns; every anti-discrimination statute has an underlying racial motive, and none of them are regarded as constitutionally suspect. Id. at 16. In addition, unlike the situation in Adarand, there was no racial classification to scrutinize because no preference was given to one race over another. See id.

The parallels between Raso and this case are substantial. In Raso, a government preference for displaced tenants would result in segregation. The government therefore decided to modify (but not eliminate) the prior tenant preference in order to foster more integrated housing. Similarly, in this case, a government policy of neighborhood school assignment would result in segregation. The government therefore decided to allow transfers that promote integration. In both cases, the government is taking race-conscious action aimed at integration. In both cases, the policy is race-neutral on its face, in that it does not favor one race over another, although individuals may be deprived of a benefit they otherwise might have received. The one difference here is that the Lynn Plan is race-conscious on its face and the plan at issue in Raso was not. Accordingly, where Raso did not undertake any equal protection scrutiny, amici propose intermediate scrutiny in this case, in keeping with the practice of other courts that have examined similar issues.

[72] Although Lynn officials refer to some of the city's schools as "magnet schools," this is something of a misnomer. Ordinarily, the term

in Adarand (government contracting), Bakke (medical school admissions), or Grutter v. Bollinger, 288 F.3d 732 (6th Cir.), cert. granted, 123 S.Ct. 618 (2002) (law school admissions), in which the defendant, in the distribution of limited resources, gives preference to some persons on the basis of race. Students like the plaintiffs may not be able to attend the specific school they want, but no student is advantaged over another on the basis of race. Cf. Hampton v. Jefferson Cty. Bd. of Education, 102 F. Supp. 2d 358, 380 (W.D. Ky. 2000) (observing that race-based assignment in elementary and secondary school education is distinguishable from other contexts in which strict scrutiny is applied, where assignment to one school over another does not confer a preference based on race).[73]

"magnet school" refers to schools that confer unique educational benefits and draw from a districtwide geographic base through a lottery system. See, e.g., Hampton v. Jefferson Cty. Bd. of Education, 102 F. Supp. 2d 358, 377 (W.D. Ky. 2000); see also, e.g., Tuttle v. Arlington Cty. School Bd., 195 F.3d 698, 701 (4th Cir. 1999). In contrast, as described in section IV.E.6, supra, Lynn's so-called "magnet" schools are really just neighborhood schools with a "theme" designed to attract some transfer applications and thereby promote integration. While parents may prefer a particular school for any number of subjective personal reasons -- the school's "theme," geographic proximity to a parent's workplace, etc. -- the parties agree that Lynn's schools, and the educational benefits they provide, are essentially fungible.

[73] As the Hampton court aptly observed:

> The workplace, marketplace, and higher education cases are poor models for most elementary and secondary public school education [cases] because they always involve vertical choices -- one person is hired, promoted, receives a valuable contract, or gains admission. Ordinarily, when [the Jefferson County school system] assigns students to a particular elementary, middle, or high school, the assignment has no qualitative or "vertical" effects. This is because the Court concludes that as between two regular elementary schools, assignment to one or another imposes no burden and confers no benefit. The same education is offered at each school, so assignment to one or another is basically fungible. As a logical consequence, most courts have concluded that there is no individual right to attend a

Indeed, in an earlier decision, I analogized the Lynn Plan to a situation in which a school administrator sought to assign students to classrooms within a given building in order to maximize diversity and to prevent minority children from choosing one classroom and white children another. Comfort, 100 F. Supp. 2d at 67 n.17.[74] Clearly this kind of decision would not warrant strict scrutiny.

I recognize, however, the need to proceed with caution. The parties may agree that all of Lynn's schools provide equal educational opportunities, but the voluntary transfer system is rooted in the principle that parents will find one school preferable to another for personal reasons -- e.g., the convenience of its location or attractiveness of its "theme" program. As a result, although I am convinced by amici that intermediate scrutiny is the correct test to apply here, my analysis below will apply the more rigorous standard which the parties have briefed, strict scrutiny.

> specific school in a district or to attend a neighborhood school. . . . Under this analysis, [the Jefferson County school district] would not be prohibited from using race in its general student assignments to maintain its desegregated school system ....

Hampton, 102 F. Supp. 2d at 380 (footnote and citations omitted).

[74] Likewise, courts in the Sixth and Third Circuits have refused to apply strict scrutiny to school district policies that assigned teachers to certain schools based, in part, on their race. Jacobson, 961 F.2d at 102-03; Kromnick, 739 F.2d at 903. The Jacobson court found that intermediate scrutiny was warranted because, as the Jacobson court observed, the teacher assignment plan at issue "is applied equally to both black and white teachers. In some instances, it will benefit or harm white teachers; in others, it will benefit or harm black teachers." Id.

An even stronger case for intermediate scrutiny can be made here, where the parties have stipulated that no one school is superior to another -- a concession that was not apparent in Jacobson or Kromnick.

2. Facial Challenge to the Racial Imbalance Act

The plaintiffs argue that the RIA violates the Equal Protection Clause of the Fourteenth Amendment and is therefore facially invalid. The standard for facial invalidation of a statute is rigorous: "[T]he challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987).[75] It is clear to me that the

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[75] The Salerno Court observed that where First Amendment claims are raised, there is another basis for invalidation, namely, overbreadth, which plainly does not apply here. Salerno, 481 U.S. at 745.

Other courts also have suggested that the broad language of Salerno may no longer be valid. As the Seventh Circuit observed, the Supreme Court in both Stenberg v. Carhart, 530 U.S. 914 (2000), and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), invalidated abortion restrictions that "might have been construed by the state courts to have at least some proper applications," without even mentioning Salerno. A Woman's Choice--East Side Women's Clinic v. Newman, 305 F.3d 684, 687 (7th Cir. 2002). Thus, the Eighth Circuit has concluded that "an abortion law is unconstitutional on its face if, 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.'" Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1457 (8th Cir. 1995) (quoting Casey, 505 U.S. at 895). A more general standard could be applied outside the abortion context that would "hold a law to be facially unconstitutional when it would operate as a substantial obstacle to an otherwise lawful course of action in a large fraction of relevant cases." S.D. Myers, Inc. v. City & Cty. of San Francisco, 253 F.3d 461, 467 (9th Cir. 2001) (ultimately concluding, "we will not reject Salerno in other [non-abortion] contexts until a majority of the Supreme Court clearly directs us to do so").

This debate is of little import here. First, the First Circuit has not yet joined this fray and continues to use the Salerno standard for facial challenges. See Pharmaceutical Research and Mfrs. of Am. v. Concannon, 249 F.3d 66, 77 (1st Cir. 2001). Second, this Court is not aware of any decision repudiating Salerno outside the context of abortion restrictions. Third, even if the narrower Casey standard applied, there is no suggestion in this case that the RIA in any way restricts, impedes or deters lawful action "in a large fraction of

plaintiffs cannot make out a facial claim against the statute.

As I have noted above, the RIA includes both hortatory and mandatory components. The statute urges school districts to adopt voluntary plans to alleviate racial imbalance. Mass. Gen. Laws c. 71, § 37C. The state is also empowered to induce compliance by offering grants and/or by withdrawing existing financial assistance. Id., § 37I; Mass. Gen. Laws c. 15, § 1I, ¶¶ 2, 3, 4. However, if space limitations preclude a school district from accommodating a desegregative transfer out of a neighborhood school, the mandatory provisions of the Act are triggered. The school district is then required either to devise its own plan to accommodate such a transfer (subject to the approval of the state Board of Education) or to implement a plan drafted by the state. Mass. Gen. Laws c. 71, § 37D; Mass. Gen. Laws c. 15 § 1I, ¶ 1.

Although the plaintiffs challenge it, the mandatory provision of Section 37D is not at issue here;[76] Lynn adopted its plan voluntarily. The state never found that space constraints in Lynn schools precluded requested desegregative transfers. The compulsory provisions of the RIA were never triggered. As such, the plaintiffs can claim no injury from the mandatory provisions of the Act. See Daggett v. Comm'n on Governmental Ethics and Election Practices, 205 F.3d 445, 463 (1st Cir. 2000) (citing Lujan, 504 U.S. at 560). Plaintiffs claim that the distinction between the mandatory and hortatory elements of the law is a distinction without a difference. The statute, they say, not only encourages school districts to adopt racial balancing plans and rewards compliant

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relevant cases." Fourth, in contrast to the constitutional right to abortion, there is no constitutional right to school choice.

[76] Were I to reach the challenge to the mandatory provision, the same principles that govern the constitutionality of the Lynn Plan would apply here, as the trigger for the provision -- namely, the denial of a student's request for a desegregative transfer -- uses race in much the same way as the Lynn Plan does.

school districts with funds, Mass. Gen. Laws c. 15, § 1I, ¶¶ 3, 4, it effectively coerces this practice by making state assistance to school districts contingent on the implementation of these "voluntary" plans, id., § 1I, ¶ 2.

But even if I were to find that the RIA's use of funds to encourage voluntary plans were in fact coercive, and therefore the functional equivalent of its mandatory provisions, I would not find it unconstitutional. A school district may theoretically adopt a plan that improves racial imbalance without explicitly introducing race-based criteria at all.[77] In fact, the City of Boston satisfied the Board of Education's RIA review with a student assignment policy that this Court recently found to be completely race-neutral. Boston's Children First v. Boston School Comm., ___ F. Supp. 2d ___, ___, available at 2003 WL 1957480, at *9 (D. Mass. Apr. 23, 2003) (observing that the state Board of Education accepted Boston's school assignment plan even though it did not incorporate racial enrollment targets or racial guidelines and likewise finding it immune to equal protection challenge).[78]

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[77] The plaintiffs admitted as much at trial, when I raised the following hypothetical: Assume two contiguous school attendance zones, one of which is predominantly minority and the other predominantly white. Plaintiffs' counsel conceded that a school district would satisfy the RIA and the Equal Protection Clause if it closed the two schools and opened a new, larger school between the neighborhoods that consolidated the student populations. Similarly, if a small district with racially identifiable school attendance zones built a single central elementary, middle, and high school to absorb its entire enrolled student populations, this strategy would qualify as a racial balancing plan under the RIA, and it would not trigger any equal protection scrutiny.

[78] The plaintiffs in this case also facially challenge the provision of the RIA that reimburses the transportation costs of desegregative transfers. Mass. Gen. Laws c. 15, § 1I, ¶ 3 provides, in pertinent part:

> The commonwealth shall . . . pay to a city, town, or regional district school committee one hundred percent of the cost of transportation of non-white pupils and minority pupils . . . transferred from schools in which racial imbalance exists and one hundred per cent of the cost of transportation of

Moreover, the fact that the goal of the RIA's funding is race-conscious -- to improve racial balance in the Massachusetts schools -- does not necessarily invalidate it. See Raso, 135 F.3d at 16. Were that the case, Congress could never validly exercise its § 5 enforcement powers. See U.S. Const., amend. XIV, § 5 (noting that Congress "shall have power to enforce, by appropriate legislation, the provisions of this article," including the Equal Protection Clause of § 1). All nondiscrimination statutes take notice of race in some way.

3. The Strict Scrutiny Standard

> white pupils transferred from schools in which racial isolation exists to schools in which racial imbalance or racial balance exists for the purpose of reducing or eliminating racial imbalance as provided by said section thirty-seven D.

Unlike the RIA provisions that fund and encourage racial balancing plans, which admit of race-neutral possibilities (e.g., locating schools on the borders of segregated enclaves), the Commonwealth's decision to reimburse transportation costs necessarily takes account of a student's race in each transfer. Although reimbursements may be made available to all students, white or nonwhite, who choose desegregative transfers, whether or not a transfer is desegregative, and therefore eligible for state funding of its transportation costs, must turn in part on the student's race (as well as the racial makeup of the student's current and destination schools).

This fact would trigger the same form of equal protection scrutiny that I apply to the Lynn Plan, which approves desegregative and neutral transfers, but not those that would exacerbate racial imbalance.

However, the reimbursement provision bears only on the question of which government entity -- the state or the school district -- pays the transportation costs of a transfer. There is no evidence in the record to suggest that any student's transfer went unfunded by Lynn or the Commonwealth. As such, it is difficult to see what possible injury students could suffer as a result of one government entity's funding their school transportation costs, as opposed to another. Absent any injury, the plaintiffs' facial challenge to the RIA on this basis must fail. See Casey v. City of Newport, R.I., 308 F.3d 106, 119 (1st Cir. 2002) (reciting the standing requirement that the plaintiff's claimed injury be causally related to the action it challenges).

As noted above, proponents of a racial classification ordinarily must demonstrate that it advances "a compelling state interest," an interest above and beyond ordinary government goals, and further, they must demonstrate that the classification is "narrowly tailored" to that end.

While these questions are ultimately questions of law, Cotter v. City of Boston, 193 F. Supp. 2d 323, 341 n.8 (citing Wygant v. Jackson Bd. of Education, 476 U.S. 267, 274-76 (1986)), and legal precedent can give guidance to courts, each case turns on the peculiarities of its own facts. See, e.g., Wessmann, 160 F.3d at 797-98, 802 (finding the necessity of a race-based policy to be a "fact-sensitive inquiry" and cautioning that the "devil is in the details").

An important part of this "fact-sensitive inquiry" is the setting -- that is, the kind of policy at issue and the context in which it operates. Significantly, the Supreme Court has not yet heard a case dealing with the issues raised here -- the use of race in a voluntary transfer program to maximize integrated learning in the K-12 grades. It is not easy to apply to public elementary school education the same legal frameworks established for employment, as, for example, in Adarand or Croson,[79] or even higher education, as in Bakke. Nor is it easy to apply legal standards designed to analyze when race may be used retrospectively, to remedy past intentional discrimination, in settings where race is used prospectively, as part of a curriculum that encourages students to learn to interact in a multiracial environment.

a. Compelling State Interest

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[79] See Wessmann, 160 F.3d at 829 (Lipez, J. dissenting) (observing on the subject of numerical goals that elements of the "narrow tailoring" analysis may not make the transition from the employment to the educational context gracefully; education, after all, is directed at shaping individuals in a prospective manner").

"Diversity" may well be a compelling state interest in an educational setting, depending on the nature of the setting and the reasons why diversity is sought. In Regents of the University of California v. Bakke, 438 U.S. 265 (1977), the Supreme Court evaluated an affirmative action program for medical school admissions. The University of California argued that it had a compelling interest in cultivating a "diversity" of viewpoints in its student body, and that an applicant's racial background was relevant to the views that he or she would bring to the class. Id. at 311-15. A plurality of the Court held that "genuine diversity" was a valuable contributor to a "robust exchange of ideas" at the university and so passable as a compelling interest. Id. at 312-14. The Court explained, however, that the university's use of race and ethnicity alone in its cultivation of genuine diversity would "hinder rather than further [its] attainment." Id. at 315. In other words, the university could not establish that its policy furthered its announced compelling interest of fostering "viewpoint diversity," because that interest "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." [80]

Considerable debate has followed Bakke about the extent to which racial diversity can ever be a compelling interest. What the Bakke Court did make clear was that sounding the inherent value of "diversity" is not enough; the analysis is incomplete unless one looks to the specific, tangible benefits that diversity actually confers in a given situation.[80]

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[80] This Court recognized that axiom in McLaughlin v. Boston School Comm., 938 F. Supp. 1001 (D. Mass. 1996), in which it observed that "the phrase 'educational diversity' is less than fully explanatory . . . . It is, rather, the many educational benefits to which racial [and] ethnic diversity might be thought a conduit that, when taken together, constitute the compelling diversity interest defendants here assert." Id. at 1014.

The First Circuit spoke to this issue in Wessmann. There, the court confronted the Boston school district's racial preference to African American and Hispanic applicants in its admissions process to the Boston Latin School, a competitive and prestigious public high school to which students applied for limited slots and were selected for admission primarily on the basis of academic merit. Wessmann, 160 F.3d at 791, 793. Following Bakke's cue, the Wessmann court observed that Boston Latin's exclusively racial preference could not foster the "genuine diversity" approved in Bakke. Nevertheless, in Wessmann, the court (following the Second, Fourth and Ninth Circuits) refused to hold that race-based classifications are constitutional only when they are directed at redressing prior unlawful discrimination. Id. at 795-96. In that regard, the court expressly parted company with the Fifth Circuit's holding in Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

And further, like the Second, Fourth, and Ninth Circuits, the Wessman court acknowledged that diversity could well be a compelling state interest in an educational setting, depending on the circumstances. Wessmann, 160 F.3d at 796; see also Brewer v. West Rondeeeequoit Cent. School Dist., 212 F.3d 738, 748-49 (2d. Cir. 2000) (citing Eisenberg v. Montgomery Cty. Pub. Schools, 197 F.3d 123, 130 (4th Cir. 1999) (assuming that diversity can be a compelling interest)), and Hunter v. Regents of the Univ. of Cal., 190 F.3d 1061, 1067 (9th Cir. 1999) (affirming the constitutionality of race-based admissions processes to an experimental elementary school based on the need for researchers to work with racially diverse classes of students)).[81] The court rejected

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[81] The Wessmann court also cited Lutheran Church-Missouri Synod v. Fed. Communications Comm'n ("Lutheran Church"), 141 F.3d 344 (D.C. Cir. 1998), which rejected FCC equal employment opportunity regulations that used a racial classification directed at "fostering [radio] programming that reflects minority viewpoints or appeals to minority tastes." Id. at 354. In so doing, the D.C. Circuit addressed whether the goal of promoting "diverse" programming satisfied the

an all-or-nothing approach: Fostering diversity is not always a compelling interest, nor is it true that diversity is never a compelling interest. Id. at 796 ("[W]e assume arguendo . . . that some iterations of 'diversity' might be sufficiently compelling, in specific circumstances, to justify race-conscious actions.").

Although Wessmann and Bakke address race-conscious policies in public education, their holdings are of limited import here. First, both involve race-based preferences in the allocation of a limited government resource -- a slot in a medical school or in an elite and selective high school. This is not an issue in Lynn. Second, in each case the defendant sought to justify its preference on the ground that, in the abstract, racial diversity is necessary to ensure viewpoint diversity. In contrast, Lynn's appeal to diversity as described below is directed at altogether different and more specific goals, namely, preparing students to be citizens in a multiracial

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compelling state interest standard and concluded that it did not. The setting, however, was very different from the instant case. Since the FCC never defined what "diverse programming" meant, and any content-based definition would raise First Amendment concerns, the Court suggested that the "government's formulation of the interest seems too abstract to be meaningful." Id. While it acknowledged that an earlier Supreme Court decision (in Metro Broadcasting v. Fed. Communications Comm'n, 497 U.S. 547 (1990)) recognized such an abstract diversity interest as "important," the court suggested that this characterization was bound up in the Court's use of intermediate scrutiny in Metro Broadcasting, a standard that Adarand had overruled in the interim. Id. In any event, the diversity interest at issue in Lutheran Church was an interest in viewpoint diversity that is not at issue here, and which the First Circuit found absent in the Boston Latin policy. Wessmann, 160 F.3d at 798. In the Wessmann decision the First Circuit found Lutheran Church to have limited import. Wessmann, 160 F.3d at 795 ("We think that any . . . consensus [among the circuit courts that diversity may never be a compelling interest] is more apparent than real. In the education context, Hopwood is the only appellate court to have rejected diversity as a compelling interest, and it did so only in the face of vigorous dissent from a substantial minority of the active judges in the Fifth Circuit." (emphasis added)).

society and eliminating the concrete harmful consequences that de facto segregation inflicts on a public school system.

b. Narrow Tailoring

The goal of the "narrow tailoring" requirement is to ferret out illicit uses of race by governments, to make certain that a racial classification is neither pretextual nor overbroad. Croson, 488 U.S. at 493; Boston Police Super. Officers Fed'n v. City of Boston ("Boston Police"), 147 F.3d 13, 23 (1st Cir. 1998). Three concerns are evident in the case law: (1) the extent to which the challenged policy is necessary to pursue a compelling interest (and whether there are adequate race-neutral alternatives), (2) the extent to which the policy is proportional to that interest, and (3) the proportionality between the benefits the policy provides and the harm caused to "innocent persons" as a result of its implementation.

(1) Are the means necessary; are there adequate race-neutral alternatives?

The question of necessity logically breaks down into two components -- (1) does the race-based policy actually further the compelling interest? and (2) might race-neutral alternatives to the policy be as effective in pursuing the interest?

It goes without saying that a race-conscious policy is not narrowly tailored to a compelling interest if it does not, in practice, effectuate the ends contemplated by that interest. A classification that does not further the legitimate ends of government obviously would not even survive the less exacting rational basis review reserved for nonracial classifications. E.g., Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001). Strict scrutiny incorporates this bare-minimum requirement, but reaches still further for a showing of necessity.

Since "narrow tailoring" is all about the "fit" between compelling ends and race-conscious means, a review of

the goals of the enterprise and its settings is critical. The mission of the schools in Wygant, 476 U.S. at 270-71 (reviewing preferential protection from layoffs for minority teachers), was to educate students. The mission of the City of Richmond in Croson, 488 U.S. at 481 (reviewing preferences for minority contractors), was to install plumbing fixtures in a city jail. The mission of the Alabama Department of Public Safety in Paradise, 480 U.S. at 153 (reviewing racial preferences in state trooper promotions), was to provide public safety. The reason for being, respectively, of these institutions was not to provide work for teachers, contracts for minority-owned businesses, or promotions for African American troopers. In those settings, the Court's analysis started with proposed compelling interests and institutional ends askew. While that does not mean that such programs necessarily fail to pass constitutional muster, it does mean that the program's proponents face an especially complex task of justification.

In contrast, an important mission of K-12 schools, in addition to fostering academic achievement, is the cultivation of social skills that enable students to function as citizens in a complex and diverse world. If "narrow tailoring" is about "fit," the creation of an integrated school environment is surely likely to be a better "fit" relative to this goal than an integrated workplace is to a commercial setting.

Moreover, where educational policy is concerned, in contrast to a commercial enterprise, school officials possess a special expertise acknowledged in the case law. That expertise must play an important role in evaluating whether race-neutral alternatives will be effective in creating a multiracial learning environment and whether they are adequate to the task. See infra Section V.B.3.b.(4).

(2) Is the policy proportional to the compelling interest?

Courts must also ascertain the extent to which the imposition of the challenged policy is proportional to the urgency of the stated government interests. A race-based government practice must not overshoot its articulated purpose by using race too often, too heavy-handedly, or for too long.

Again, the examples come from employment. In order to determine whether the use of race went beyond what was remedial, the Paradise Court, for example, scrutinized the quantum of racial preferment given to minorities and its relationship to the defendant's interest in remedying the effects of discriminatory hiring practices. Paradise, 480 U.S. at 179. The Court focused on the proportionality between the "numerical relief ordered and the percentage of nonwhites in the relevant work force." Id.

Where the means are modest, and in fact undershoot the remedial goal, a court will affirm the policy, as in the Cotter case. The City of Boston departed from strict rank order to promote African American police officers in three of thirty-six promotions. Since the police department would have had to promote twenty African American officers to equalize the percentage of African American officers and African American sergeants, the Court concluded that the modest means chosen signified narrow tailoring. Cotter, 323 F.3d at 171.[82]

A policy that is flexible and changes with changing conditions is also more likely to meet the proportionality test. Id. at 177-78. In addition, the duration of the state actor's use of race figures into the analysis. Id. at 172; see also, e.g., Paradise, 480 U.S. at 178 (touting the limited duration of a racebased remedial promotions policy as a sign that the policy was not a tool for the implementation

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[82] The Court cited McNamara v. City of Chicago, 138 F.3d 1219 (7th Cir. 1998), for the proposition that the narrow tailoring test is "whether the increase is a plausible lower-bound estimate of a shortfall in minority representation among [sergeants] that is due to the [Department's] intentional discrimination in the past." Id. at 1224.

of racial balancing in government employment); Boston Police, 147 F.3d at 23 (inquiring into whether the challenged policy "contains (or fails to contain) built-in mechanisms which will, if time and events warrant, shrink its scope and limit its duration").

Duration is an especially critical factor when the compelling interest involves remedying past discrimination. Once the problem is "cured," the need for race-based standards arguably disappears. Mackin v. City of Boston, 969 F.2d 1273, 1278 (1st Cir. 1992) ("Finally, the decree's life is limited, remaining in force only until its requirements have been met. Limitations of this sort are crucial factors in deflecting overbreadth challenges." (citation omitted)). In contrast, where the targeted problem is ongoing and persistent, the analysis is more complex. Narrow tailoring does not necessarily require a predetermined shut-off point. The parties can offer a more fluid approach so long as the race-conscious policy dovetails with the conditions that made it necessary in the first place.

(3) What Is the Impact on Third Parties?

A court will also assess the promised and proven benefits of the racial criterion against the depth and breadth of its impositions upon innocent third parties. Bakke, 438 U.S. at 308-09. Innocent third parties are more at risk in decisions about hiring and firing in a commercial setting, the awarding of public contracts, or admission into a school of higher education. Each case represents the classic zero-sum game, where one party wins and another necessarily loses.

Moreover, where the benefit requires specialized skills, the impact on a qualified applicant with settled expectations, or even with an entitlement to the job or to a slot in a school, is more significant. See Paradise, 480 U.S. at 182 (finding significant the fact that a racial classification prefers only qualified applicants of one race for hiring or promotion, and that the impact on qualified

applicants of another race is minimal); Boston Police, 147 F.3d at 24 (listing "the extent to which . . . legitimate expectancies are frustrated or encumbered" as a factor in the narrow tailoring analysis).

Again, in a K-12 school system, educational and curricular policies intended to benefit all students may have an impact on "innocent third parties," but not to the same degree as in competitive commercial or higher-education settings. The question in a school setting, to which I have already alluded, is not whether a given plaintiff will receive a given limited benefit (like a job or access to a unique institution of higher learning) to which he or she is entitled. Rather it is whether any student is entitled to a particular school assignment at all and, in any event, whether the education the plaintiff will get at his or her second choice is comparable to that which he or she would receive at his or her first choice.

(4) Miscellaneous Concerns: Deference to School Boards' "Narrow Tailoring"

A school setting necessarily raises other questions relevant to the "narrow tailoring" analysis: To what extent do school boards deserve deference in making school assignment decisions that are intertwined with curricular decisions? Or, to rephrase the question, how far must a federal court go to micromanage the school board's choices, after the court has assured itself that the basic constitutional standards are met? How perfect must be the "fit" once the broad legal standards have been met?

Clearly, in the school cases involving remedial raceconscious plans imposed to eliminate the vestiges of prior de jure segregation, courts have carefully supervised local school boards to make certain that they were dismantling the dual school systems for which the school boards were found responsible. But when the records have suggested that those boards were finally operating in good faith to create an integrated system, the courts have done an about-face, giving deference to their determinations that unitary status has been

achieved and that remedial plans should be discontinued. See Freeman v. Pitts, 503 U.S. 467, 489-90 (1992). As the First Circuit has observed:

> Unitary status is not simply a mathematical construction. One non-quantitative factor of particular significance is whether the school defendants have a sufficiently well-established history of good faith in both the operation of the educational system in general and the implementation of the court's student assignment orders in particular to indicate that further oversight of assignments is not needed to forestall an imminent return to the unconstitutional conditions that led to the court's intervention. See Morgan v. McDonough, 689 F.2d 265, 280 (1st Cir. 1982) ("the ending of obstructionism plainly signals a return to greater local control"). . . .
>
> The relevance of good faith underscores the notion that unitariness is less a quantifiable "moment" in the history of a remedial plan than it is the general state of successful desegregation.

Morgan v. Nucci, 831 F.2d 313, 831 (1st Cir. 1987). It is only logical to afford at least as much deference to a school board that voluntarily undertakes desegregation efforts.

In Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1 (1971), one of the first remedial cases, the Court described the deference due to school districts in dicta:

> School authorities are traditionally charged with broad power to formulate and implement education policy and might well conclude, for example, that in order to prepare to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a

> whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of constitutional violation, however, that would not be within the authority of the federal court.

Id. at 16. Swann was cited by the Second Circuit in Brewer, 212 F.3d at 749, a nonremedial case affirming a race-conscious school transfer program to ameliorate the impact of de facto segregation.

There are good reasons to give deference to school boards' attendance to the details of their student assignments and determinations of whether race-neutral alternatives are adequate. They are the experts in what will or will not work because they are uniquely attuned to the needs of a diverse urban community. Over and over again, courts have given school boards discretion to weigh the constitutional rights of students against the unique demands of a public education setting and curricular needs. See, e.g., Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (emphasizing courts' "reluctance to trench on the prerogatives of state and local educational institutions," as federal courts are ill-suited to "evaluate the substance of a multitude of academic decisions that are made daily" by experts in the field).[83]

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[83] See also Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 664-65 (1995) (holding that random drug testing of student athletes in public schools does not violate the Fourth and Fourteenth Amendment protections against unreasonable searches and seizures); Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that the contents of a school newspaper were a curricular matter within the school's discretion such that the principal's significant edits did not implicate the First Amendment); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding that a sexually suggestive student government speech was not protected by First Amendment free speech and expression rights); New Jersey v. T.L.O., 469 U.S. 325, 339-41 (1985) (holding that to require probable cause before school administrators might conduct a search or seizure would constrain the school's control and articulating a "reasonable suspicion" test for Fourth Amendment cases in the public primary school context); Ingraham v. Wright, 430 U.S. 651, 664 (1977) (holding that "the

To be sure, strict scrutiny requires a rigorous analysis of the plan and its ramifications. Nevertheless, these cases should, at the very least, inform the weight I give to the conclusions of the administrators of the Lynn Plan.

4. The Goals of the Plan

The Lynn Defendants claim that the race-conscious element of its school assignment plan is narrowly tailored to achieve several compelling state interests. Some interests are proactive, that is, affirmatively related to meeting the curricular goals and the educational mission of a diverse urban public school: promoting racial and ethnic diversity, increasing educational opportunities for all students and improving the quality of education and ensuring student safety. Several interests are more reactive, that is, related to the goal of eliminating the negative effects of de facto residential segregation on public education: reducing minority isolation and ensuring the safety of its public school students. Finally, some goals are related to the federal constitutional requirements spelled out in Brown v. Board of Education and the state constitution.

I have divided these goals into three categories, although they are analytically interwoven.

a. Curricular Goals: "Promoting Racial and Ethnic Diversity," "Increasing Educational Opportunities for All Students and Improving the Quality of Education," "Ensuring Safety"

Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools"); Goss v. Lopez, 419 U.S. 565, 581-84 (1975) (finding a student's due process rights under the Fourteenth Amendment to be limited in cases of short-term school suspension); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 510-11 (1969) (allowing school officials to regulate student political speech when it threatens "material and substantial interference with schoolwork or discipline").

(1) Are These Curricular Goals Compelling State Interests?

The defendants claim that their goals -- promoting racial and ethnic diversity, increasing educational opportunities for all students, improving the quality of education, and ensuring school safety -- are compelling state interests inextricably tied to the mission of a public K-12 school system. As I have noted, the purpose of the public school system is as much to teach citizenship to its students as it is to teach academic subjects. Indeed, at the elementary school level, to which this challenge is principally directed,[84] teaching citizenship -- the proverbial effort to ensure that students "work and play well with others" -- is one of a school's highest educational priorities.

And this is especially the case in a multiracial, urban community like Lynn. The years predating the Lynn Plan saw a district riven by racial tension, with the promise of still greater tension due to deepening residential segregation. Lynn school officials had to confront a decline in day-to-day school attendance, a decrease in white enrollment, a sharp increase in incidents of conflict and confrontation between white and nonwhite students, and a specific failure in the district's educational mission: Lynn's students were not prepared to live and work in an increasingly racially diverse society.

The Plan was essential to reverse these trends. Its approach was comprehensive, going well beyond a race-conscious transfer policy to include specific curricular

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[84] Lynn's high schools all meet the standard for racial balance. Any Lynn student may apply to, or transfer to, any of them. While a high school's mission is surely more academic-oriented than that of the elementary schools, citizenship training is still part and parcel of the enterprise. The testimony of Lynn high school student Nicole Oak, as well as the responses that juniors attending all three of Lynn's High schools gave to Dr. Orfield's Diversity Assessment Questionnaire, speak to the value of continuing to teach racial issues through high school.

offerings on race relations, specialized training for teachers and students on diversity, standardization of curriculum and resource distribution between schools in white and minority neighborhoods, and the establishment of the Parent Information Center to foster parent involvement in the schools.

And the Plan was successful. The defendants point to evidence of significant improvements in Lynn schools occasioned by the district's adoption of the Plan -- improvements that have increased educational opportunities for all students: the amelioration of racial and ethnic tension in Lynn schools, the emergence of a prevalent racial and ethnic tolerance in the schools, increased attendance, a growing feeling of comfort among students in engaging and confronting issues of race, an emerging sense of community that crosses racial barriers, improved student discipline, a stable enrollment of white students, and safer schools.

The plaintiffs concede the importance of these goals. Indeed, they agree that Lynn schools are considerably better and safer than they were before the Plan was instituted. What they dispute is whether the race-conscious elements of the Plan are crucial to achieving these benefits, that is, whether the Plan's use of race is narrowly tailored within the meaning of the law.

(2) Is the Plan Narrowly Tailored to These Compelling Interests?

(a) Are the Plan's Means Necessary to Achieve its Ends?

As a general matter, the Lynn Plan necessarily meets the requirement of narrow tailoring: When a government's ends are fundamentally concerned with race -- and those ends are recognized as compelling -- it is natural that race-conscious means provide the "snuggest fit" to those ends. Brewer, 212 F.3d at 752 (finding that

"there is no more effective means" of reducing racial isolation "than to base decisions on race").[85]

The evidence from defendants' impressive array of experts established the essential relationship between the race-conscious aspects of the Plan and the curricular ends outlined above. The evidence establishes the following: If the compelling goal of the Plan is to train citizens to function in a multiracial world, actual intergroup racial contact is essential. No amount of race-neutral resource apportionment would accomplish this result. Second, intergroup contact cannot be achieved with only token numbers of minorities in a overwhelmingly white schoc' (or vice versa). Third, there is a tipping point of 20% white or nonwhite students, well-recognized by experts in this field and dubbed the "critical mass," that is crucial to catalyzing positive intergroup contact.[86]

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[85] See also Elizabeth S. Anderson, Integration, Affirmative Action, and Strict Scrutiny, 77 N.Y.U. Law Rev. 1195, 1243-44 (2002) ("[W]hen the state's purpose is explicitly race-conscious . . . its use of racial means is not only clearly relevant to its purpose, but more narrowly tailored to that purpose than race-neutral means could be.").

[86] As Dr. Dovidio -- as well as each and every one of the other experts noted, the use of race in Lynn's school assignments and its achievement of critical mass was the cause of the improved race relations:

> I focused on trying to distinguish what the effects of the plan were, the effects of achieving 20 percent or more of split within the schools to see if that had effects that seemed to be over and above any other effects, effects that could be explained primarily due to the plan and not due to these other factors.
>
> I didn't come up with -- there was no parsimonious explanation for the improvements that I saw. There was no reasonable explanation. There was no valid explanation that consistently explained the data, except for the plan, in my judgment.
>
> Q. And that is all aspects of the plan?
>
> A. That has to do with the fact that the plan produces the critical mass of 20 percent . . . .

(b) Proportionality of the Means

The Plan's use of race is measured and proportional to these compelling goals. The policies that have been implemented are less intrusive than other potential means at the district's disposal. Every parent can choose a neighborhood school for his or her child. A parent has the further option of participating in the district's integration effort. Should the parent choose to do so, his or her child is entitled to any transfer that does not exacerbate racial segregation in the schools.

There are no rigid quotas, no unchanging formula -- even with respect to the 20% figure advocated by the experts. While the Plan aims for that number because of its acknowledged effect of improved race relations, only the demographics of Lynn at this time (42% white and 58% nonwhite) make it possible to achieve that number systemwide. In effect, the Plan has a hybrid goal that befits the complexity of the situation and evinces a sensitivity to all of Lynn's constituencies — to maximize integration and aim for a minimum 20% minority representation, consistent with a neighborhood school system and Lynn's demographics.

The Plan's use of race is flexible, and of limited duration. An automatic shut-off mechanism is built in: If the racial composition of a school falls in line with the districtwide white/nonwhite ratio, the limits on transfers evaporate. In fact, because all of Lynn's high schools meet the district's racial balance standard, students may transfer freely among them, space permitting.

As the demographics of the city of Lynn change, so do the parameters of the Plan. It foists no more or no less "diversity" on the schools of the city than the demographics of the city and a neighborhood system allow.

(c) Minimal Burden on Third Parties; the Issue of Stigma

Finally, Lynn's chosen means place a minimal burden on innocent third parties. Nothing compels a school

district to allow parents to choose their child's school. There is no entitlement to attendance at a given school, and no special qualifications or prerequisites for admission to any school.

Nor does any stigma attach to the failure to get one's first choice of transfer school, or to the government's recognition of an individual's race. Part of the thrust of Brown was that de jure segregation sent a clear message to minority students that school officials believed they did not belong in classrooms with their white counterparts. Brown, 347 U.S. at 493-94 ("To separate [minority students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

The Lynn Plan sends quite the contrary message -- it conveys to all students that notwithstanding residential segregation, students of different races can and should coexist in integrated, cooperative learning environments, and that the school district is committed to encouraging that. Lynn uses race in school admissions not because an individual student's race matters, but because the district recognizes that race relations matter. Dr. Dovidio testified that racial identity is a social construct: although racial differences are perceived and not real, that perception of difference has enough historical momentum that one must acknowledge it in order to defeat it. Race is the elephant in the room that does not go away until it is confronted.

It has been suggested that when a school district inquires into a child's race at registration for school assignment purposes, that gesture, whatever the underlying motives, leaves an indelible scar on the child's psyche. See Tuttle v. Arlington Cty. School Bd., 195 F.3d 698, 707 & n.12 (4th Cir. 1999). Putting aside the fact that this view, as a general matter, would impugn remedial desegregation orders even in de jure cases, the Lynn school district's commitment to promoting racial

harmony and celebrating the city's diversity deprives this argument of any specific force in this case.

Even if it were reasonable to conclude (and I find it highly doubtful) that students in Lynn come away from school registration with the mistaken belief that the district means to remind them of racial difference, everything about the Lynn experience is directed at clarifying and correcting this misapprehension. As Drs. Killen and Dovidio testified in their discussion of the "authority sanction" component of intergroup contact, Lynn's teachers, administrators and staff are committed to the principle that students of all races are to enjoy equal status, that the city's multiracial character is something to celebrate, and that students have much to gain from cross-racial relationships. Indeed, that Lynn officials have tried to accomplish their integrative purpose through a voluntary transfer system -- with neighborhood schools absolutely available should parents so desire -- speaks volumes about their sensitivity to third-party interests.

Unlike programs in colleges and universities, the Lynn Plan does not control access to any limited benefit. The parties agree that all students will get a comparable education. Curricula are standard and the differences between schools are largely variations on a theme. Competency levels are evaluated on a systemwide basis; if any given school falters, remedial action will be taken to ensure that it meets the standards set by its counterparts in the district.

Finally, there are no race-neutral adequate alternatives for integrating the school populations. See infra Section V.B.4.b(3).

(3) Plaintiffs' Arguments Do Not Apply in Lynn

The plaintiffs make several "narrow tailoring" challenges. First, they suggest that the Plan's focus on racial minorities is inconsistent with the end of "genuine diversity." Second, plaintiffs argue that the

improvements in Lynn schools could have been accomplished through additional resources.

(a) a White/nonwhite Distinction Is Appropriate

There are sixty-five racial and ethnic groups within Lynn's student population, the plaintiffs argue, and far from targeting classrooms that reflect the range of ethnic diversity in Lynn, the Plan's notions of racial balance seek only to ensure extensive contacts between whites and nonwhites. Relying on Wessmann, the plaintiffs claim that a policy that targets racial diversity, rather than "genuine diversity," can never be narrowly tailored.

Plaintiffs' critique is off the mark. The Plan does not target the "genuine diversity" that the First Circuit found absent in Wessmann. In Wessmann, as I have noted, the court held that the Boston Latin School's commitment to "racial and ethnic diversity" did not comport with the "genuine diversity" that a plurality of the Supreme Court approved in Bakke as a means to foster a robust exchange of ideas. Wessmann, 160 F.3d at 798. Bakke-type diversity is an expressive "diversity of viewpoints" and is predicated on the notion that people of different backgrounds will make unique contributions to academic discourse. As such, it "encompasses a far broader array of qualifications . . . of which racial or ethnic origin is but a single though important element." Id. (quoting Bakke, 438 U.S. at 315) (internal quotation marks omitted)). In any case, race classifications directed at viewpoint diversity, the Wessmann court held, are nothing more than mechanisms for "racial balancing" based on broad generalizations about the contributions different races and ethnic groups will make to the classroom. Wessmann, 160 F.3d at 799.

The Lynn Plan does not pursue "racial balancing" toward the end of filling stereotyped "viewpoint" niches. As I stated earlier:

> The diversity interest defendants argue here makes no assumptions about any groups' unique contribution. Rather, it reflects a concern that elementary school children simply get used to being in classrooms with people different from themselves. In fact, it assumes that the more diverse a classroom is, the more likely students will learn that all people are different no matter what their color or ethnic background. It is not a form of stereotyping, but a method to prevent the formation of stereotypes.

Comfort, 100 F. Supp. 2d at 65, n.12. If the goal is to block the formation of stereotypes and racist attitudes, the most effective route, bar none, is to promote multiracial interaction.

The Lynn Plan's white/nonwhite distinction does indeed, as the plaintiffs suggest, "paint with a broad brush," but one that precisely reflects the facts on the ground in Lynn. Lynn school officials and teachers observed that in the years predating the Plan, racial divisions and ethnic conflict between students occurred predominantly along a white/nonwhite axis. The growing gap in understanding between these groups burdened the schools in ways that more precise shades of racial and ethnic difference did not.

Defense experts cited evidence in developmental psychology to support the view that tolerance of difference begins with acceptance of visible difference. A white elementary school student is more likely to differentiate himself from an Englishspeaking student in a racial minority than for a white European immigrant student who does not speak his language.[87]

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[87] Dr. Dovidio testified as well that race plays "a fundamental part of the socialization of students in America today." Dr. Killen, too, affirmed that race is a "predominant group identity" in American culture.

In fact, were Lynn to set its eye on a "true diversity" that reflected in each school the range of sixty-five ethnicities represented in its student body, the Plan's use of race (and now ethnicity as well, which is also subject to strict scrutiny, see Bakke, 438 U.S. at 290) would be substantially more intrusive than is currently the case. The Plan is crafted to use race only as frequently as is necessary to produce a measure of racial diversity that is meaningful enough to enable the schools to teach their students citizenship in a multicultural society. See Jacobson, 961 F.2d at 102 (citing Swann, 402 U.S. at 16)).[88]

(b) Additional Resources Would Not Have Been Adequate to Accomplish the Curricular Goals; the Significance of "Critical Mass"

Plaintiffs' second argument is that Lynn could have accomplished the stunning turnaround in the fortunes of its schools since the 1980s with race-neutral policies. They contend that other components of the Plan -- new facilities, increased funding from the state, teachers' commitment to and cultivation of equal status and diversity -- amply account for the strides that Lynn's schools have taken.

Implicit in the plaintiffs' critique are two others: (1) Integrated classrooms are not necessary to achieve the curricular benefits Lynn touts. Merely deluging the system with additional resources would surely do the trick. And (2) even if integrated classrooms are necessary, this race-conscious plan is not required to accomplish

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[88] The categories on which this diversity is based -- white and nonwhite -- have been accepted by other courts, see, e.g., Jacobson, 961 F.2d at 102 (affirming the use of these categories in teacher assignments within a district); Brewer, 212 F.3d at 752-53, (finding, at the preliminary injunction stage, that the use of white/nonwhite categories in deciding student transfer requests at public schools is narrowly tailored to a different kind of compelling interest than "true diversity," such that Bakke's holding is inapplicable).

them. A free choice plan coupled with magnet school incentives would have been as effective. Because it bears on Lynn's compelling interests in reducing de facto segregation as well as the district's curricular goals, I will address (2) in a separate Section V.B.4.b(3), infra, on whether the Lynn Plan was necessary to effect systemwide integration. Deluging the system with resources -- without the raceconscious transfer policy -- would not have been adequate. With respect to intergroup contact, the number of students in a classroom of a racial minority matters. Abstract instruction about racial tolerance is insufficient without meaningful contact with students of a different race. Social psychology literature cited by the defendants' experts instructs that racial isolation adversely impacts both minority attitudes and the attitudes of those in the majority. This impact becomes more pronounced as a racial minority within a group dwindles in size.[89]

There is a point at which the presence of a racial minority becomes substantial enough to catalyze intergroup relations, a tipping point" or "critical mass"[90]:

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[89] The experts noted that in other settings, such as employment, this stigmatization is demonstrated to result in poor job performance.

[90] It must be noted that the Sixth Circuit, sitting en banc, confronted the question of "critical mass" in an altogether different context in Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002). Grutter dealt with an equal protection challenge to the use of race as a factor in deciding admissions to the University of Michigan Law School. The university's use of race, as is true of Lynn's, was "aspirationally" gauged to generate a "critical mass" of under-represented minority students in an incoming law school class; that is, it did not guarantee any number of slots to minorities. Id. at 747-48.

However, the compelling interest that the university recited was not the interest at stake here. Grutter argued for the "viewpoint diversity" interest that the Supreme Court recognized as compelling in Bakke. Specifically, a diverse student population in higher education "enrich[es] students' education with a variety of perspectives, experiences, and ideas." Id. at 738 (quoting Bakke, 438 U.S. at 313). The Sixth Circuit upheld the university's admissions practices, id. at 752, and the case is presently before the Supreme Court, Gratz v. Bollinger, 123 S.Ct. 617 (granting certiorari).

Defendants' experts were unanimous on this issue. Dr. Killen analogized the accrual of intergroup contact benefits to a continuum: as a school's racial balance increases, racial tolerance accrues. Studies suggest, however, that the most significant increase in benefits occurs as the share of a school's racial minority students surpasses the 20% mark. The direct observations of the experts on the ground in the Lynn schools buttress this view,[91] as did the testimony of teachers, students and administrators.

Experts and administrators testified in Grutter that a "critical mass" of minority students is necessary to achieve the true benefits of the viewpoint diversity that the university was after. Under-represented minorities must populate a class in sufficient number that they may comfortably contribute their unique viewpoints in classroom discussions without feeling as though they are "spokespersons for their race." Grutter, 288 F.3d.

In contrast, as described above, the "critical mass" sought by the Lynn Plan is different, because Lynn's goal is not viewpoint diversity. As I have said, at the elementary, middle, and high school level, the goal of teaching socialization is at least as important as the subject matter of instruction. The value of a diverse classroom setting at these ages does not inhere in the range of perspectives and experience that students can offer in discussions; rather, diversity is valuable because it enables students to learn racial tolerance by building cross-racial relationships. In this context a meaningful presence of racial minorities -- and of whites at minority dominated schools -- is crucial not only to reducing feelings of tokenism, but also to disarming stereotypes that students in the classroom majority might harbor about students of other races.

[91] Dr. Killen also attributed districtwide racial harmony, improved discipline and attendance, etc. to the Lynn Plan's fostering of integration through school assignment. In her expert opinion, a critical mass of white or nonwhite students is essential to achieving the benefits of intergroup contact. Dr. Killen emphasized that race-neutral factors like diversity training for teachers are desirable, but if "your school is made up of kids who are 90% of one race, whether it's white or black, you're not going to achieve the goals set out that these techniques were designed to accomplish."

Likewise, Dr. Orfield testified that increased de facto segregation that would necessary follow from suspension of the Lynn Plan, see infra Section V.B.4.b, would curtail the citizenship benefits that flow to all students in an integrated environment.

Plaintiffs counter by suggesting first, that even a few minorities are enough to achieve the effects the Lynn Plan seeks, second, that even if "more" integration is needed, no research provides support for a specific percentage, and finally, whatever the legitimacy of the "critical mass" concept, it is not effected in Lynn. After all, the Plan, keyed to the demographics of the city, does not necessarily assure the critical mass. Several schools already have fallen out of line. Moreover, plaintiffs' expert, Dr. Rossell, testified that as long as schools maintain some degree of heterogeneity (the amount, unclear) such that there is some percentage of both whites and nonwhites to interact cross-racially, it is possible to obtain benefits from intergroup contact.

Plaintiffs' position is totally inconsistent with the credible evidence, and the aspects of the Plan that they identify as the weaknesses of the plan are in fact its strengths. As I have noted earlier, I find Dr. Rossell's testimony to be less than credible and surely less reliable than the defense experts. Although Dr. Rossell based her opinions on twenty-six years of experience with other schools, she made no firsthand observation of Lynn's schools and conducted no surveys or interviews of Lynn's students, teachers, or parents. See Wessmann, 160 F.3d at 804 (discounting an expert's testimony because it "relies on evidence from one locality to establish the lingering effects of discrimination in another"). In fact, at the time she formulated her opinion in this case and for some time afterward, Dr. Rossell's understanding of Lynn's student assignment process was fundamentally wrong. She insisted that it was a "controlled choice plan" that did not guarantee students access to their neighborhood schools. Not only did Dr. Rossell's testimony reflect an unfamiliarity with the conditions in the Lynn district; it is not clear from the record that she ever understood exactly how the challenged practice in this lawsuit -- Lynn's school assignment policy -- actually works.

And as to critical points in her testimony, Dr. Rossell has taken contradictory positions in the past. In this proceeding, she testified that there are no "concrete data" that show that a "critical mass" of minority students is a precondition for the success of intergroup contact techniques. Yet a 1983 publication to which Dr. Rossell was a major contributor advocated the very proposition she rejects here, namely, cultivation of critical mass of racial and ethnic minorities within schools.[92] In a striking admission for an expert, Dr. Rossell dismissed the earlier work as not based on "an ounce of research," but instead "on people's intuition." And she testifies as an expert in this case against the Lynn Plan, a position diametrically opposed to the position she took in 1988, when she was a consultant to the Lynn schools and noted that Lynn "stood an excellent chance" of desegregating its schools.

In any event, Dr. Rossell's current positions are without basis. It cannot be her position that there are no scientifically acceptable studies validating the concept of "critical mass." There plainly are, and the defense experts noted, summarized, and cited them -- in testimony that I credit. Rather, what she seems to be saying is that the studies and conclusions of social psychologist somehow do not count, no matter how esteemed the scholar or how peer-reviewed and accepted are his or her findings. To Dr. Rossell, the only satisfactory proof would be statistical, the result of a rigorous multiple regression analysis that quantified intergroup contact benefits and statistically

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[92] This 1983 publication stated:

> A critical mass of students seems to encourage intergroup contact, discourage self-isolation, facilitate the responsiveness of teachers and administrators to the special needs of the minorities, especially when remedial or bilingual programs are needed, and promote more parental involvement in the school.

These are exactly the effects that defendants and their battery of experts have attributed to the Lynn Plan.

isolated those that were directly attributable to classroom integration.

Defense experts suggest that such a study cannot be done in Lynn, and indeed, need not be done. For example, Dr. Dovidio noted that the study Dr. Rossell suggested could not be done in Lynn because the range of racial balance (or imbalance) in Lynn's schools is not broad enough to conduct a meaningful study of this kind. Isolation of the importance of racial balance to intergroup contact efforts might be possible if the range were broader -- that is, if some schools enrolled as few at 6% white or nonwhite students. At best, Dr. Dovidio explained, the study that Dr. Rossell proposed "doesn't provide a critical test of [whether] the plan [is] working, it just says within the context of a plan that is working, is more [minority representation] better?"

Moreover, such a study need not be done. Desegregation experts and social psychologists nationwide, using methodologies established in their fields, have conducted studies, published their findings, presented papers, and even testified in court as experts, all concluding that a critical mass of 20% facilitates intergroup contact. Just because Dr. Rossell, a political scientist, rejects their approach does not mean that I should as well. Plainly, not everything admits of quantification.

This is not a case of scientific precision, where too much or too little of an active ingredient ruins a chemical reaction -- and scientific precision should not be required. See Parents Ass'n of Andrew Jackson High School v. Ambach (hereinafter "Andrew Jackson II"), 738 F.2d 574, 580-81 (2d Cir. 1984) (requiring, for narrow tailoring purposes, that a race-conscious school assignment plan's articulate a "tipping point" for white flight that triggered not "the only significant drop in white enrollment," but that triggered "(on average) the most significant drop").

The dynamics in this case -- interpersonal relations -- are far more complex than that.[93] Statistical analysis may suffice to establish narrow tailoring in remedial cases, where the state's compelling interest is to correct minority under-representation within an institution, that is, where the wrong to be righted is quantifiable. Where, as here, the compelling interest fundamentally relates to shaping human growth and relations, a Rossell-style multiple regression analysis cannot be necessary -- and arguably could not be sufficient on its own -- to justify the use of race.

Finally, plaintiffs contend that "critical mass" is obviously not essential because some Lynn schools have achieved positive race relations without these numbers, pointing particularly to the Fecteau-Leary middle school.[94] The defendants' response to this is more convincing. First, as they have noted, the 20% mark is aspirational, not written in stone. The Plan seeks to achieve that level in a manner that is consistent with a neighborhood school model of a student assignment that is in turn keyed to the demographics of Lynn. In any case, all defense experts credibly suggest a continuum of effects leading to the point when intergroup contact is finally significant. It would be absurd to suggest that when a school dips marginally below 20% critical mass, a climate of racial tolerance evaporates and racial infighting instantly follows.[95]

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[93] Indeed, the dynamics of human interaction are so complex -- with so many possible internal and external dynamics shaping the course of relationships between white and nonwhite students in Lynn schools -- that I found it difficult to believe Dr. Rossell's claim that her multiple regression analysis could control for all other differences between schools except their measure of racial balance, difficult to believe.

[94] The Ingalls (81% minority), Cobbet (83%), and Harrington (84%) elementary schools, and the Fecteau-Leary (81%) middle school were all perched below critical mass in the 2001-2002 school year, and Dr. Killen did some of her observations at Fecteau-Leary.

[95] Dr. Killen explained that in Fecteau-Leary, though its white population was at 19% during the 2001-2002 school year, the school

In any case, what the plaintiffs view as a fatal flaw, I understand to be a point in the Plan's favor. Plaintiffs claim that Lynn's student assignment policy is not narrowly tailored because it is not designed to guarantee a 20% critical mass in every school misses the mark. The Lynn Plan is not a "20% no matter what" plan; the use of race only triggers when the schools pertinent to a proposed transfer deviate too much from districtwide demographics. Were the Plan calibrated to yield, without fail, a 20% critical mass in every school, it would risk characterization as a quota, be needlessly rigid and neglectful of changing conditions in Lynn. Likewise, it would override the wishes of parents who want their children to attend their neighborhood schools and would entail a more intrusive use of race in school assignment than the Lynn Plan currently provides. As such, it would hardly be "narrowly tailored."

In fact, plaintiffs' position turns on its head the very purpose of the narrow tailoring requirement, to invalidate a program because it does not use race enough to establish a perfect "fit" between means and end. As I noted before, the Plan's goals are hybrid and flexible: It effectively generates integration in Lynn's schools in such quantity as to catalyze intergroup contact while still respecting the neighborhood school principle and Lynn's ever-changing demographics. As such, it ensures all the corollary educational benefits to which the parties stipulate.

b. Remedying the Effects of De Facto Segregation: "Reducing Minority Isolation"

(1) Is this Remedial Interest Compelling?

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had recently reached critical mass, and a number of the elementary schools feeding students into Fecteau-Leary were at or above critical mass.

An important goal of the Lynn Plan is to ameliorate the effects of de facto residential segregation. It cannot change demographic patterns. It chose not to trench on the ability of a parent to send his or her child to a neighborhood school. Rather, the Plan tries to shape educational environments that neutralize the effects of these patterns, to make certain that these patterns are not determinative of a child's opportunity. Comfort, 100 F. Supp. 2d at 65 n.12.

A number of adverse educational effects flow from racially segregated schools, as described generally in the Kiernan Report that led to the RIA's enactment, and, more importantly, in the record in this case. In the 1980s the increasing racial polarization of Lynn schools, created in part through official misconduct, led to documented inequalities within the system: minority schools had inferior materials and facilities and the more experienced teachers transferred to the better funded, managed, and maintained white schools.

It would make no sense if Lynn officials were obliged to take responsibility for addressing these adverse consequences but at the same time were constitutionally barred from taking voluntary action aimed at nipping some of these effects in the bud. In effect, what the Plan sought to do was to forestall the development of racially isolated schools before the separation and the inequities become so intense that even more intrusive action -- perhaps court-ordered -- was required.

Plainly the "reduction of racial isolation resulting from de facto segregation can be a compelling government interest justifying racial classifications." Brewer, 212 F.3d at 753. In Brewer the Second Circuit vacated a district court's preliminary injunction suspending the race-conscious elements of a student assignment plan very much like the one presently before this Court. The plan at issue in Brewer allowed students to transfer from their neighborhood schools under strict conditions:

> [O]nly minority pupils are allowed to transfer from "predominantly minority city schools" to participating suburban schools, and non-minority students may transfer from suburban schools to city schools provided that their transfers "do not negatively affect the racial balance of the receiving school."

Id. at 742. The Second Circuit found that the plaintiff parents were not likely to succeed in their challenge to these race-based restrictions on transfers.

The Brewer court relied on the "Andrew Jackson cases," in which the Second Circuit held that a school district may take affirmative steps to combat de facto racial imbalance, even though such steps are not constitutionally required. See Parent Ass'n of Andrew Jackson High School v. Ambach (hereinafter "Andrew Jackson I"), 598 F.2d 705, 713-14 (2d Cir. 1979); see also Andrew Jackson II, 738 F.2d at 581 n.9. Like Brewer, the Andrew Jackson cases dealt with integration plans restricting the availability of student transfers that exacerbated conditions of racial imbalance. Specifically, the New York City school district implemented a "Controlled Rate of Change" scheme designed to reduce racial imbalance at the predominantly minority Andrew Jackson High School in Queens. Minority students in the school's attendance zones were given the opportunity to attend any high school in New York City whose student body was more than 50% white. Andrew Jackson I, 598 F.2d at 710-11.

There was a further restriction due to the district's concern that these transfers might trigger "white flight"; minority students could not transfer to schools in such numbers as to alter the racial balance by 4% or one fourth of the difference between the school's white enrollment and a 50% white enrollment (whichever was less). Id. at 711-12.

The Andrew Jackson court, applying strict scrutiny, id. at 718, affirmed the Plan. It agreed that integration --

or "inhibiting the process of resegregation" -- was in itself an end sufficient to justify the racial classification. Id. at 718 (citing Otero v. New York City Housing Auth., 484 F.2d 1122, 1140 (2d Cir. 1973) (affirming a housing authority's ability to limit the availability of units to would-be tenants based on their race, "where it can show that such action is essential to promote a racially balanced community")).[*]

As I explained above, the defendants in the present case offered substantial expert testimony as to the educational benefits that obtain from reducing minority isolation and de facto segregation in public schools. In this respect I predicate my conclusion, that reducing minority isolation is indeed a compelling interest that can justify race-conscious student assignment, on a record far more developed than the district and appeals courts had before them in the Andrew Jackson cases, or in Brewer.

(2) Is the Lynn Plan Narrowly Tailored to this Compelling Interest?

There is no doubt that Lynn's race-conscious restrictions on voluntary transfers actually reduce minority isolation. The evidence is uncontroverted -- and the logic unquestioned -- that Lynn's Plan, which forbids

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[*] The Andrew Jackson court remanded for further development of the issue of narrow tailoring; the court was particularly interested in how the Board hit upon its 50% figure. Id. at 720. The school district justified that percentage to the trial court as a "tipping point" of a different kind than the defendants' proposed "critical mass" here. Their data suggested that fifty percent was the point beyond which a minority presence in the school triggered white flight to suburban school districts. The district court rejected this theory, on the ground that the data showed that in some schools white flight occurred at similar or even greater rates when minority enrollment reached the 60% or 70% level. Andrew Jackson II, 738 F.2d at 579-80.

The Second Circuit vacated and remanded the case once again. Its review of the 50% tipping point was not as exacting as the district court's. The Court of Appeals found it sufficient that the 50% tipping point produced the "most significant drop" in white enrollment and did not require the school district to show that 50% hosted the "only significant drop." Id. at 580.

white students from transferring into and minority students from transferring out of schools regarded as "racially isolated." Arguably, since the Plan's attention to a student's race is strictly limited to contexts in which a proposed transfer would exacerbate an identified condition of racial isolation, it is by definition narrowly tailored to the Lynn Defendants' stated purpose of reducing racial isolation.

But that logic obviously cannot alone vindicate the Plan's use of race. Lynn has to justify the specific parameters it has settled upon, and whether there are race-neutral alternatives to their use. A broader view of racial isolation, for example, would justify the use of race more often. If, for example, Lynn narrowed the range of allowable deviation from districtwide percentages to 1%, a school would be "racially isolated" in the 2001-2002 school year if fewer than 57% of its students were minorities. More schools would fit the definition of racial isolation, and the race-conscious restrictions on transfers would trigger more often. If Lynn is to appeal to "reducing racial isolation" as a compelling government interest, it must answer, in the context of narrow tailoring, for its definition of what "racial isolation" is.

I conclude that Lynn's definition of racial isolation is appropriately calibrated. As the Second Circuit's review of the school district's 50% tipping point marker in Andrew Jackson II illustrates, this is an inexact science. A race-conscious recourse must be minimally intrusive, but it must also have enough force to effectuate its ends in a meaningful way, see Wessmann, 160 F.3d at 810 (Boudin, J., concurring). This is a difficult channel for a school district to navigate, and if a court gives too little leeway, strict scrutiny becomes what the Supreme Court never intended it to be -- "fatal in fact." See Adarand, 515 U.S. at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1979) (Marshall, J., concurring)).

In this case Lynn's definition of racial isolation is narrowly drawn. First, if the goal is to prepare students to live in a multiracial world, it makes sense to begin

with an environment reflective of that world, namely, the demographics of the City of Lynn. The measure of balance that Lynn has selected, as Dr. Orfield, an expert on desegregation planning, noted, was tied to the overall breakdowns within the district, and so typical of desegregation efforts. Cf. Belk v. Charlotte-Mecklenburg Bd. of Education, 269 F.3d 305, 319 (4th Cir. 2001) (observing that "the plus/minus fifteen percent variance is clearly within accepted standards, and provides a reasonable starting point in the unitary status determination"). Second, the demographics of Lynn's school-age children (42% white and 58% nonwhite) ensure that the most racially isolated schools in the district, Lynn Woods (25%), Sisson (27%), and Shoemaker (30%), have at least a "critical mass" of minority students. Third, the plan attempts to minimize racial imbalance and isolation while preserving neighborhood schools and eschewing forced busing.

(3) Race-Neutral Alternatives are not Feasible

The plaintiffs maintain that, even if (as I have concluded) an improved racial balance in Lynn's schools is crucial to Lynn's educational goals, there were race-neutral methods of assignment that could have been adequate.

McArdle's analysis of residential patterns in Lynn suggests that residential segregation is deepening. She described a community with neighborhoods that are growing increasingly segregated by race -- in her expert opinion, that would not change in the next five to ten years. McArdle and Drs. Dovidio, Killen, and Orfield all predicted that Lynn's schools would become more and more racially identifiable if students were allowed to attend only their neighborhood schools. In fact, McArdle gave evidence that, if school attendance zones were to remain intact, a neighborhood-only plan would reduce the minority population of Lynn Woods from 24% to 8%, Shoemaker from 30% to 6%, and Aborn from 35% to 12%.

Conversely, minority populations would increase at Cobbet, from 83 to 86%, and at Connery, from 80 to 87%.

Dr. Rossell's rebuttal was curious. She suggested that the school could redraw the neighborhood attendance zones to maximize integration. To be sure, Dr. Rossell did not bother to verify the feasibility of this alternative against the particulars of Lynn's geographical residential patterns.[97] Moreover, she conceded that, as McArdle described, there is a large "separate and physically distinct" portion of northeastern Lynn that is predominantly white, but she could not explain how attendance zones would be drawn to integrate neighborhood schools given this geographic dispersion.[98] Indeed, Superintendent Kostan, with far greater experience in Lynn, predicted that "even if we redistricted, you still would have predominantly . . . minority schools and predominantly racially isolated white schools."

While I agree with Dr. Rossell that it may always be possible in theory to craft attendance zones so that they

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[97] Q. Did you perform any evaluation or study of the geographic locations of schools and each of their attendance zones to come to the conclusion that, in fact, they could move attendance zones and would be able to integrate their schools similar to what they currently have in their schools?

A. I haven't done that particular analysis of Lynn, but I have designed many desegregation plans, and I know it can be done.

[98] Dr. Rossell's conclusion seemed to be predicated in part on a different standard of what was an acceptable amount of integration -- that is, her view that there is no "critical mass" that marks a significant upturn in the benefits obtained from intergroup contact:

Q. So, it's your testimony that the Aborn school . . . which is currently at 34% minority, and would become 12% minority, would continue to be a racially integrated school under your definition?

A. Twelve percent is racially diverse, yes.

Emphasis added.

draw equally from geographically separate racial enclaves, at a certain point they would be "neighborhood schools" in name only. Students would be required to travel considerable distances to attend schools that are suddenly, by the fiction of redistricting, announced to be in their "neighborhood." Students in the city's minority core would be obliged to go to school in the overwhelmingly white northeastern region of Lynn (and vice versa). In fact, it is hard to imagine how, given Lynn's existing pattern of residential segregation, the district could redraw its neighborhoods to desegregative effect without compromising the integrity of the neighborhood-school principle and, worse yet, initiating forced busing.[99]

In contrast, the Lynn Plan, which guarantees a student's admission to a "true" neighborhood school and affords additional options subject to overt racial restrictions, is more flexible and less restrictive than would be a race-motivated redrawing of neighborhoods.

Dr. Rossell also suggested that Lynn could create real magnet programs that would draw white students voluntarily from their predominantly white neighborhood schools into minority identifiable schools, and vice versa. Again, however, Superintendent Kostan, citing data culled by Lynn's PIC on trends in transfer requests, and

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[99] The present location of Lynn's schools would make a redrawing of neighborhoods -- even so minimally as to achieve the limited integration that the Lynn Plan effectuates -- a race-neutral cover for forced busing. Earlier in this decision I raised hypothetically the prospect of a district locating schools between or on the borders of racially identifiable neighborhoods. This approach would be less intrusive than would be a redrawing of neighborhoods to shape the populations of schools where they are presently placed. It might well be the most desirable means to achieve racial balance, but the Constitution takes note of practicality. The alternative must be economically feasible, see Wygant, 476 U.S. at 280 n.6 (finding race-neutral alternatives relevant if they achieve the stated end "about as well and at tolerable administrative expense"). The periodic demolition, relocation, and reconstruction of schools in response to changes in residential patterns is a far from viable alternative.

Lynn's past experience, testified that a pure choice plan would result in resegregation: "trends would indicate that if you implemented a plan such as that, you probably would find that minority students would gravitate to racially isolated minority schools and white students would gravitate to racially isolated white schools." And in fact. Lynn tried, without success, in the 1980s to draw white students into a magnet school in a minority neighborhood.

Studies by the Lynn PIC of parent preferences in Lynn show that minority parents favor schools in minority-dominated areas and white parents prefer schools in white areas. Parents tend to seek transfers to neighborhood schools contiguous to their own, as opposed to schools across town, with the result that -- regardless of whether they intend to self-segregate -- they choose schools in their own racial enclaves. Lynn school official and PIC director Janet Birchenough observed that white parents request 500 to 800 segregative transfers in a given year under the current Plan; all of these would have to be approved under a free-choice plan. Given the likelihood that free choice would result in still more requests for segregative transfers than are made presently (as the deterrent restrictions on such transfers would have been eliminated), it is difficult to see how a comparable measure of desegregation can be achieved this way.

Birchenough testified that Lynn has also considered school assignment by lottery. A lottery would randomly arrange students on a list; the school would make its assignments by proceeding down the list, accepting every parent's first school choice, unless the favored school was already filled. In that case the student would be assigned to his second choice, and so on. This policy suffers from the same flawed underpinnings: the PIC has documented trends showing that white parents tend to choose schools that are predominantly white, and nonwhite parents favor predominantly nonwhite schools.

In fact, even to the extent that white and nonwhite students would seek transfers to the same school, resort to a lottery system would not result in an integrated population at that school. The PIC's data demonstrate that under the current Plan white parents tend to bid for transfers much earlier in the year than do minority parents. Minority parents move into and between locations in the city more often, due to their comparative socioeconomic disadvantage. They are often not in a position to consider their children's school options in March and April and May, when white parents typically register their children. Most minority registrations occur later in the year, particularly on the cusp of the school year in August and September.

According to Birchenough, the district could not feasibly hold a single end-of-summer lottery to determine school assignments for the entire district in order to accommodate minority parents. In order to make appropriate staff assignments and resource allocations, the district must have some measure of notice of what schools its students will be attending. Conversely, a monthly lottery system that slotted students beginning in March would be workable, but it would effectively result in white students obtaining their first choice placements before minority students even articulate their preferences. If there are schools that white and nonwhite students both want to attend, the monthly lottery system would ensure that these schools remained predominantly white.[100]

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[100] There is a rough correlation between socioeconomic status and race in Lynn: the wealthier areas of the city are predominantly white, and the poorer areas tend to be minority dominated. Lynn's PIC has studied the possibility of using this correlation to foster racial integration in a race-neutral way. Birchenough testified on the feasibility of a school assignment plan, facially race-neutral, that would make the ability to transfer contingent on one's socioeconomic status. This use of socioeconomic status as a "cover" for race, the PIC concluded, would not ameliorate de facto segregation in Lynn. The white students who live in poor, largely nonwhite neighborhoods

c. Interest (5): "Providing an Education to All Students that Satisfies Federal and State Constitutional Requirements"

(1) The Command and Promise of Brown v. Board of Education

The Lynn defendants argue that the Plan "serves the compelling state interest in voluntarily achieving the 'clear command' of Brown v. Board of Education." While I conclude that the defendants are wrong to suggest that the Lynn Plan is compelled by Brown, since there is no evidence of ongoing de jure segregation, they surely have an interest in fulfilling the promise of Brown. For nearly fifty years, courts have recognized that eliminating school segregation -- whatever its cause -- is a proper and compelling governmental objective. While the courts in recent years have imposed more demanding requirements on the means to achieve integration, they have never repudiated the goal.

Clearly, there was a period in time -- during the 1970s and 1980s -- when Lynn was vulnerable to a suit challenging the acts of school officials who knowingly exacerbated racial segregation within the district. But that moment passed, headed off by the very Plan in contention here. To be sure, it cannot be credibly suggested that this Plan in 2003 is narrowly focused on remedying the effects of 1980s discrimination.[101] The focus has to be in

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typically have the same socioeconomic status as their nonwhite neighbors. These white students would be eligible to transfer out of their predominantly minority schools into white schools, thereby exacerbating racial imbalance.

If the only result of a socioeconomic approach is socioeconomic desegregation, the approach is not helpful in addressing issues of race. Dr. Orfield testified that "you can't really learn about racial differences just by socioeconomic desegregation if it does not produce racial desegregation."

[101] Indeed, to conclude that Lynn must continue to maintain a raceconscious school assignment plan in order to eradicate the

the present. And today, if Lynn eliminated the Plan, school segregation would follow directly on the heels of residential segregation. While Lynn contends that lifting the Plan's restrictions, with knowledge of what would follow, would expose them to a charge of discrimination, see, e.g., Diaz v. San Jose Unified School Dist., 733 F.2d 660, 670-71 (9th Cir. 1984); NAACP v. Lansing Bd. of Education, 559 F.2d 1042, 1051 (6th Cir. 1977), it overstates its exposure under current case law. Brown appeared to suggest that, whatever its cause, segregation in schools results in unequal educational opportunities that violate the Constitution. See Brown, 347 U.S. at 494 (noting that segregation is generally detrimental although the impact is "greater when it has the sanction of the law" (emphasis added)). However, in the years since Brown, it is clear that inequality born of residential segregation -- the choices of citizens, and not government — is unlikely to expose the Lynn defendants, as they contend, to legal attack under the Equal Protection Clause. In short, Brown does not command school systems to redress de facto segregation. See Freeman, 503 U.S. at 495.

Nevertheless, in recognizing the consequences of de facto segregation, Brown and its progeny, quite apart from their mandatory elements, also have a powerful

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segregative effect of transfer practices abandoned fifteen years ago -- when Lynn was a predominantly white community -- would require me to ignore the testimony of the defendants' own demographics expert, Nancy McArdle. As I explain above, McArdle ably demonstrated that residential segregation in Lynn is severe enough that the Lynn Plan is necessary to forestall de facto segregation that would necessarily follow from a strict neighborhood attendance zone plan. It is inferable from parents' tendencies to self-sort into neighborhoods by race that, given an open transfer program that accommodated segregative and desegregative transfers alike, the lion's share of transfers sought would be segregative. The evidence clearly establishes a risk of reversion to segregation, but of a de facto nature. Conversely, I have no factual or expert testimony before me to suggest that there are still lingering effects of Lynn's de jure practices to redress.

hortatory significance aimed at eventually uprooting school segregation "root and branch." Green v. Cty. School Bd., 391 U.S. 430, 437-38 (1968). In pursuit of the promise of integration, the Supreme Court has repeatedly affirmed in principle voluntary desegregation policies adopted by school districts to foster, preserve, and operate "unitary" school systems. See, e.g., Busstop, Inc. v. Bd. of Education of the City of Los Angeles, 439 U.S. 1380, 1383 (1978) (Rehnquist, J.) (expressing "very little doubt" that states can order desegregation beyond what the Constitution requires); Swann, 402 U.S. at 45. Even Justice Powell, author of the Bakke plurality opinion, endorsed a state's voluntary desegregation statute as "the sort of effort that should be considered by state and local officials and elected bodies." Columbus Bd. of Education v. Penick, 443 U.S. 449, 488-89 n.7. (1979) (Powell, J., dissenting).[102]

As Justice Marshall pointedly observed:

> The real irony of the argument urging mandatory, formal findings of discrimination lies in its complete disregard for a longstanding goal of civil rights reform, that of integrating schools without taking every school system to court. . . . It would defy equity to penalize those who achieve harmony from discord, as it would defy wisdom to impose on society the needless cost of superfluous litigation. . . . [F]ormal findings of past discrimination are not a necessary predicate to the adoption of affirmative action policies, and the scope of such policies need not be limited to remedying specific instances of identifiable discrimination.

Wygant, 476 U.S. at 305 (Marshall, J., dissenting).

To say that school officials in the K-12 grades, acting in good faith, cannot take steps to remedy the

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[102] Notably, the Supreme Court has never even suggested that a voluntarily-adopted forced busing plan would be illegal.

extraordinary problems of de facto segregation and promote multiracial learning, is to go further than ever before to disappoint the promise of Brown. It is to admit that in 2003, resegregation of the schools is a tolerable result, as if the only problems Brown addressed were bad people and not bad impacts. Nothing in the case law requires that result.

(2) State Constitutional Requirements

Defendants also argue that state law requirements justify the Plan. As a general matter, I do not agree that a state constitutional requirement is a per se compelling interest in the Equal Protection analysis. The Fourteenth Amendment specifically empowers the federal government to act against discriminatory government actions at the state and local level, particularly those made on the basis of race. See, e.g., Shelley v. Kraemer, 334 U.S. 1, 23 (1948) ("The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color."). An interest therefore cannot rise to the level of "compelling" solely because it is enshrined in a state's constitution.[103] Something more is required -- something about the principle reflected in the state constitution that either comports with federal principles or offers greater protection than the federal law.

The principle articulated here is that under Part 2, Chapter 5, § 2 of the Massachusetts Constitution, every

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[103] Federal courts have stricken state constitutional provisions under the Equal Protection Clause -- finding at least one not even to pass rational basis review. See, e.g., Romer v. Evans, 517 U.S. 620, 631-32 (1996) (invalidating a state constitutional provision that refused protected status to homosexuals).

resident of the Commonwealth is to be guaranteed an "adequate" education. McDuffy v. Sec'y of Exec. Office of Education, 415 Mass. 545, 617 (1993) ("It is clear that [the Massachusetts Constitution] obligates the Commonwealth to educate all its children." (emphasis in original)). To the extent that the adequacy requirement bears on the overall quality of education made available, this "compelling interest" folds into the analysis I have already done in Section V.B.4.a, supra: The Lynn Plan is narrowly tailored to the compelling interests of cultivating racial diversity and reducing minority isolation in amounts sufficient to create an atmosphere of racial tolerance in Lynn's schools and prepare Lynn's students to live in a multicultural society. To the extent that the Massachusetts Supreme Judicial Court ("SJC") has found the adequacy requirement to command that schools offer equal resources to students, id., the "compelling interest" of state constitutional compliance on that score folds into my analysis of Lynn's interest in reducing de facto segregation, with all its burdensome consequences on nonwhite children, in Section V.B.4.b, supra.[104]

C. Other Federal Claims

As I find that the Lynn Plan does not violate the Equal Protection Clause, I likewise conclude that the plaintiffs have not established their claims of unlawful racial discrimination under 42 U.S.C. §§ 1981 and 2000d or the derivative claims under 42 U.S.C. §§ 1985 and 1986.

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[104] The compelling nature of Lynn's articulated educational interests, as well as the extent to which the Lynn Plan is narrowly tailored to them, are established above on the strength of evidence submitted regarding the city of Lynn and the state of its school system before and after the Plan's implementation. I am reluctant to leverage these very specific facts to conclude that the state's "adequacy" mandate is necessarily compelling in the abstract. As to Lynn, it is nonetheless clear on the record before me that the race-conscious elements of the Plan are crucial to its educational mission.

1. Title VI

42 U.S.C. § 2000d (Title VI of the Civil Rights Act of 1964) forbids racial discrimination "under any program or activity receiving federal financial assistance." The plaintiffs' Title VI claims against the state defendants were earlier dismissed, Comfort, 131 F. Supp. 2d at 254, but the claims against the Lynn defendants remain. The plaintiffs identify no act of racial discrimination under Title VI other than the Lynn defendants' use of race in student assignments, a practice that I found did not violate the Equal Protection Clause. Title VI "proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." Alexander v. Sandoval, 532 U.S. 275, 280-81 (2001) (quoting Bakke, 438 U.S. at 287). The plaintiffs thus have not established a claim under Title VI.

2. 42 U.S.C. § 1981

Likewise unavailing are the plaintiffs' claims under § 1981, which, "like the Equal Protection Clause, can be violated only by purposeful discrimination." General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 391 (1982). Section 1981's ban on racial discrimination, when applied to state actors, is coextensive with the nondiscrimination principle in the Equal Protection Clause. Ohio Contractor's Ass'n v. Keip, 713 F.3d 167, 175 (6th Cir. 1983) (finding that a remedial program that did not violate the Equal Protection Clause of necessity did not violate § 1981); Mescall v. Burrus, 603 F.2d 1266, 1271 (7th Cir. 1979) ("The relationships of §§ 1981 and 1983 to the Fourteenth Amendment are so close and they are each so strongly under its influence that we believe the use of each section must be guided by the principles announced by the Supreme Court for application of the Fourteenth Amendment to discrimination cases."). Accordingly, because the Lynn Plan does not violate the Equal Protection Clause, the

plaintiffs have likewise failed to make out their claims under § 1981.[105]

Moreover, the discrimination shown must specifically impair

> one or more of the following rights: to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981. I already held, as to the Comfort plaintiffs, that Lynn's school assignment plan has no bearing upon any of the rights set forth in § 1981. Comfort, 131 F. Supp. 2d at 255 n.5.

3. 42 U.S.C. §§ 1985, 1986

42 U.S.C. § 1985(3) furnishes a cause of action against anyone who conspires to deprive citizens of their right to equal protection under the law. 42 U.S.C. § 1986 further authorizes suit against any person who fails to act to prevent a § 1985 violation. As the plaintiffs have not established any civil rights violation or any unrealized conspiracy on the part of the defendants to commit such a violation, judgment must enter for the defendants on these claims as well.

D. Article 111 of the Massachusetts Declaration of Rights

Plaintiffs advance a pendent state law claim that the Lynn Plan violates Article 111 of the Amendments to the Massachusetts Declaration of Rights, which provides that "[n]o student shall be assigned to or denied admittance to

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[105] This reading of § 1981 does not render it superfluous. The value added of the statute, over and above the Equal Protection Clause, is that it is binding on private as well as public actors.

a public school on the basis of race, color, national origin or creed." Mass. Const. amend. art. 111. Plaintiffs contend that when a child's option to attend a school other than his or her neighborhood school is limited in order to avoid fostering racial imbalance, he or she is illegally "denied admittance to a public school on the basis of race."

While this position has certain surface appeal, the plaintiffs' reading of Article 111 cannot stand up to historical and legal scrutiny against the backdrop of SJC's canons of state constitutional interpretation and the requirements of the United States Constitution. First, the Lynn Plan's modest limitations on the range of transfer options beyond neighborhood schools do not "deny admittance to a public School on the basis of race" in the meaning of Article 111, which was designed chiefly to limit forced busing and preserve neighborhood schools. Second, while no court has ever expressly interpreted Article 111, the SJC has consistently construed similarly worded statutes narrowly, holding that they do not categorically ban suspect classifications but rather merely subject them to strict scrutiny. Third, the broad reading of Article 111 that the plaintiffs propose, which would flatly prohibit any raceconscious assignment policies in the public schools, must be rejected because its validity under the United States Constitution and consistency with other provisions of the Declaration of Rights is highly doubtful. In short, it is no accident that Article 111 has coexisted peacefully for decades with race-conscious integration efforts in the state's public schools. The amendment poses no obstacle to the Lynn Plan.

1. Applicable Principles of Constitutional Interpretation

The SJC has outlined a series of considerations to guide judicial interpretation of the Massachusetts Constitution.

> In determining the meaning of a constitutional provision, we look to the language and structure of the provision, so that it is "construed so as to

> accomplish a reasonable result and to achieve its dominating purpose." We do so bearing in mind the Constitution was "written to be understood by the voters to whom it was submitted for approval. It is to be interpreted in the sense most obvious to the common intelligence. Its phrases are to be read and construed according to the familiar and approved usage of the language." The words of a constitutional provision "are to be given their natural and obvious sense according to common and approved usage at the time of its adoption."
>
> Moreover, the Constitution "is to be interpreted in the light of the conditions under which it and its several parts were framed, the ends which it was designed to accomplish, the benefits which it was expected to confer, and the evils which it was hoped to remedy." . . .
>
> Lastly, the Constitution "is a statement of general principles and not a specification of details . . . It is to be interpreted as the Constitution of a State and not as a statute or ordinary piece of legislation. Its words must be given a construction adapted to carry into effect its purpose.

McDuffy v. Sec'y of the Executive Office of Education, 415 Mass. 545, 558-59 (1993) (citations omitted). In addition, "constitutional provisions must be construed together to make an harmonious frame of government." Opinion of the Justices, 303 Mass. 631, 640 (1939).

Finally, "[w]hen the validity of an act . . . is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." School Comm., 366 Mass. at 338) (Quirico, J., concurring). This "rule is a venerable one and is often

repeated in opinions by courts throughout the United States." Id. at 339-40 (Tauro, J., concurring). It "evolved because of a judicial desire to preserve amicable relations with coordinate branches of government and to assure the fullest possible consideration of constitutional questions before decision." Id. at 345. The same logic would apply when, as with a statute, a proposed construction of a state constitutional provision provokes federal constitutional doubt.

2. The Lynn Plan and the Purpose of Article 111

The Lynn Plan does not conflict with the "natural and obvious" meaning or the "dominating purpose" of Article 111 because it neither "assigns" students nor "denies admittance" to them "on the basis of race." The Plan plainly has no effect on school assignments in the first instance: typically, as a default matter, a child in Lynn attends his or her neighborhood school. The Plan never, under any circumstances, denies admittance to a child's neighborhood school or compels a child to attend a more distant school.

The Plan does not entail rigid racial classifications -- e.g., all white students must transfer from a certain school, all black students may not transfer to a certain school. Every student may attend his or her neighborhood school. The Plan simply operates to define the range of elective attendance options open to each student in a way that avoids fostering racial imbalance and isolation. This governing principle -- desegregating the schools -- is in fact the only reason why transfers are permitted in the first place.

These are meaningful distinctions -- not mere sophistry -- that fully comport with the underlying purposes of Article 111. The legislative history of Article 111 clearly demonstrates that the "benefit it was expected to confer" was preservation of neighborhood schools, and the "evil which it was hoped to remedy" was the politically divisive resort to forced busing. Article 111 was

adopted by joint sessions of the Massachusetts General Court in 1975 and 1977 and was approved by ballot measure in 1978. The House and Senate bills that became Article 111 were introduced by a group of legislators on behalf of the Massachusetts Citizens Against Forced Busing. See Mass. Sen. Jour. 52 (1975); Mass. H. Jour. 510 (1975); Mass H. Jour. 257, 565 A (1977). The constitutionally-required description of the proposed article in the 1978 Massachusetts Information for Voters[106] stated:

> A "YES VOTE" would guarantee the right of parents or guardians of school-age children to educate those children free from any arbitrary assignment by school authorities to schools outside the school district. Any public assignment to a school outside the school district, based on achieving any established racial quota-system or ethnic balance[,] would require the permission of the parent or guardian.

Massachusetts Information for Voters (1978).[107] Contemporaneous press accounts from each hurdle in the passage of Article 111 likewise emphasized its aims of

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[106] The Massachusetts Constitution requires that the Secretary of State publish and distribute to voters certain information regarding ballot questions, which includes:

> The full text of every measure to be submitted to the people, together with . . . a fair, concise summary of the measure as such summary will appear on the ballot [and] other information and arguments for and against the measure.

Mass Const. art. 48, General Provisions pt. IV, as amended by arts. 74 and 108. The SJC commonly uses the contents of Information for Voters to discern legislative intent. See e.g., Bates v. Director of Office of Campaign and Political Finance, 436 Mass. 155, 166 (2002); Commonwealth v. Colon-Cruz, 393 Mass. 150, 161 (1984).

[107] Significantly, this text both confirms the amendment's intended focus on neighborhood schools/busing and, with the "parental consent" exception language, further suggests that it was not intended as a blanket prohibition on race-conscious assignment policies.

preserving neighborhood schools and eliminating forced busing. See, e.g., Constitutional Convention Approves Antibusing Amendment as Filibuster Fails, Boston Globe, June 12, 1975, at 11 ("The joint House and Senate approved the anti-busing amendment to the Massachusetts Constitution . . . "); Legislature Talks Little but Enacts a Great Deal, Boston Globe, Sept. 8, 1977, at 3 ("A joint session of the Legislature, after moderate debate, approved an amendment to the state Constitution that would prohibit the busing of public school children to achieve racial balance."); Six Referendums Win -- Seventh Close, Boston Globe, Nov. 8, 1978, at 14 ("The proposal, which fosters the neighborhood school concept and is regarded by many as being antibusing, was leading . . . in latest returns . . . .").

The Lynn Plan expressly preserves neighborhood schools while at the same time managing to ameliorate racial imbalance and isolation, all without resort to coercive school assignments or forced busing. It neither assigns students to distant schools nor denies admittance to neighborhood schools. At most, it sometimes may limit the range of available elective out-of neighborhood transfers, not "on the basis of race," but in order to avoid creating racial isolation or imbalance. The Lynn Plan is thus consistent with both the letter and the spirit of Article 111, as broadly envisioned by the legislators who drafted it and the voters who ultimately enacted it.

3. SJC Interpretation of Similar Language

While the Lynn Plan is consistent even with the broad intentions of Article 111's proponents, SJC decisions interpreting similar statutory language suggest an even narrower construction under which suspect classifications in the schools are not prohibited categorically but rather are simply subject to strict scrutiny. The logical conclusion from this SJC reasoning is that Article 111 is simply an education-specific analog of more general constitutional provisions that guarantee equal rights and equal protection.

For example, in Attorney General v. Mass. Interscholastic Athletic Ass'n, Inc. ("MIAA"), 378 Mass. 342 (1979), the SJC held that an Association rule -- "No boy may play on a girls' team" -- ran afoul of both the Massachusetts Equal Rights Amendment and Chapter 76, § 5 of the Massachusetts General Laws, a statutory precursor of Article 111. Id. at 363. The Equal Rights Amendment, Mass. Const. pt. 1, art. 1 as amended by Mass. Const. amend. art. 106, provides broadly that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." At the time, Chapter 76, § 5 provided -- in language later mirrored in Article 111 -- that "No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, religion, or national origin." Notably, the SJC held that the "absolute bar on male participation" imposed by the Association rule was not categorically invalid but rather "prima facie invalid under ERA or our cognate statute, [Mass. Gen. Laws c. 76, § 5], barring sex discrimination in the educational sphere." MIAA, 378 Mass. at 353 (emphasis added). "[S]uch classifications," the SJC explained, "are not permissible unless they meet two conditions: they must 'further a demonstrably compelling interest and limit their impact as narrowly as possible consistent with their legitimate purpose.'" Id. at 354 (internal citation omitted); see also Opinion of the Justices, 374 Mass. 836, 842 (1977) (holding that a proposed amendment to Mass. Gen. Laws c. 76, § 5 that would prohibit women from participation with men in contact sports would fail a strict scrutiny test and violate the states Equal Rights Amendment); Opinion of the Justices, 373 Mass. 883, 888 (1977) (holding that a proposed statutory exclusion of Lowell's "Girl Officers Regiment" would fail constitutional scrutiny and violate the Equal Rights Amendment).

In other words, notwithstanding the apparent language of absolute prohibition in Chapter 76, § 5, the

legality of suspect classifications in educational programs under the statute simply boils down to a strict scrutiny test. The SJC treated Chapter 76, § 5 as a specific statutory embodiment of constitutional equal protection principles for the education sphere – a "cognate statute" – and nothing more. The obvious conclusion is that nearly identical language concerning school assignment in Article 111 likewise boils down to a strict scrutiny equal protection test, a cognate constitutional provision enshrining the general principle of equality in the particular realm of public education.[108]

As I have explained in Section V.B.4, supra, the Lynn Plan is a narrowly tailored measure aimed at promoting

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[108] The long-term historical coexistence of anti-discrimination provisions of the state constitution and various statutes with race-conscious school assignment programs further reflects the lack of inherent conflict between the two.

As yet another example, the 1972 Fair Educational Practices statute, Mass. Gen. Laws ch. 151C, § 2 — which provides, "it shall be an unfair educational practice for an educational institution . . . [t]o exclude or limit or otherwise discriminate against any United States citizen or citizens seeking admission as students to such institution because of race, religion, creed, color, or national origin" — has never been held to prohibit any public or private institution's affirmative action program.

The Massachusetts Department of Education's current Equal Opportunity regulations expressly recognize the compatibility of nondiscrimination principles and racial balancing. They provide, consistently with Article 111, that "[a]ll public schools in the Commonwealth shall admit students without regard to race, color, sex, religion, national origin, or sexual orientation." Mass. Regs. Code tit. 603, § 26.02(1) (cited locally as 603 CMR 26.02(1)). At the same time, they emphasize that "[n]othing in 603 CMR 26.00 shall control the interpretation of or interfere with the implementation of M.G.L. c. 71, §37C [the Racial Imbalance Act] and related statutes, providing for the elimination of racial imbalance in the public schools." Id. § 26.02(6).

To accept the plaintiffs' argument that the Lynn Plan violates Article 111 would, without any directly applicable state precedent or judicial sanction, potentially upend a host of long-accepted state statutory and constitutional law and practice.

compelling governmental interests. It therefore comports with the requirements of Article 111, as the SJC has construed similar language.

4. State Constitutional Harmony and Federal Constitutional Doubt

The SJC's consistent view that various anti-discrimination and equal protection laws boil down to a "strict scrutiny" test - - even where language might suggest absolute prohibition of suspect classifications — is not surprising when viewed in historical context. Indeed, the plaintiff's proposed broader reading of Article 111 would conflict with other parts of the Massachusetts Constitution and would provoke serious doubt as to its validity under the United States Constitution. In contrast, a construction of Article 111 that applies strict scrutiny, rather than categorically prohibit the use of race, avoids these constitutional tensions.

While the SJC has never expressly construed Article 111 itself, the court's analysis of other proposed anti-busing measures is revealing. In 1973, for example, the SJC rendered an advisory opinion that a bill entitled "An Act prohibiting transportation of pupils without the written consent of their parents or guardians" would violate both the federal and state constitutions.[109] Opinion of the Justices, 363 Mass. 899, 908 (1973).

First, the SJC explained, the anti-busing legislation would be invalid because it would categorically prohibit measures that might be required to remedy unconstitutional discrimination.

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[109] The bill provided, inter alia, that "[n]otwithstanding any law to the contrary, no child attending public school shall be transported to or from any public school without the prior written consent of his parent or legal guardian. Each of such children shall be permitted to attend the school nearest his residence within his city or town, which has a seat available in his grade, unless his attendance at another school has been requested by his parent or legal guardian." Opinion of the Justices, 363 Mass. 899, 842 (1973).

> In North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971), the [U.S.] Supreme Court struck down a statute prohibiting the involuntary busing of students to achieve racial balance in North Carolina Schools. In an unanimous opinion, Chief Justice Burger concluded that 'an absolute prohibition against transportation of students assigned on the basis of races, or for the purpose of creating a balance or ratio,' will similarly hamper the ability of local authorities to effectively remedy constitutional violations.' . . . [This bill] suffers from the same constitutional defect to the extent that its absolute prohibition against involuntary busing 'would inescapably operate to obstruct' remedies granted by Federal or State courts that have found de jure segregation.'

Id. at 901-02 (citations omitted). Significantly, the court found that an absolute ban on busing in Massachusetts would be invalid under Swann even though, at the time, no Court had ordered desegregation measures within the Commonwealth.[110] See id. (acknowledging "full awareness that there has been no holding by any court that de jure segregation exists in Massachusetts, nor has any State court been called upon to decide that question").[111] Second, the SJC held that the anti-busing bill would be unconstitutional under Reitman v. Mulkey, 387 U.S. 369

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[110] Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974), which did find de jure segregation in Boston, was still pending at the time.

[111] Swann also recognized the importance and value of race-conscious assignment policies in operating an integrated, or "unitary" school system. "[S]chool authorities have wide discretion in formulating school policy, and . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements. . . . [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall. . . ." 402 U.S. at 45.

(1967), because it "serves to perpetuate existing segregation in some of the schools, regardless of its cause, and thus 'significantly encourage[s] and involve[s] the State' in racial discrimination." Opinion of the Justices, 363 Mass. at 902-03 (quoting Reitman, 387 U.S. at 381)).

> The facts of the Reitman case parallel the tortured history of our racial imbalance law. The California Legislature had enacted legislation which prohibited private racial discrimination in the sale or rental of private dwelling. In 1964, the California Constitution was amended by passage of Proposition 14, which gave every Californian the constitutional right to lease or sell his private dwelling to whomever he wanted. The California Supreme Court conceded that since there was no constitutional duty upon the State to end private housing discrimination the State could constitutionally repeal such legislation and retain a neutral stance toward such private discrimination. But the California Supreme Court held that Proposition 14 not only repealed pro tanto existing legislation prohibiting racial discrimination in housing, but also encouraged and significantly involved the State in private racial discrimination contrary to the Fourteenth Amendment by expressly sanctioning the private right to discriminate as a matter of State policy. In affirming the California Supreme Court's decision invalidating Proposition 14, the Supreme Court of the United States recognized that courts must assess the historical context, immediate objective, and "potential impact of official action in determining whether the State" has merely adopted a position of neutrality or one of encouragement of and involvement with private racial discrimination.
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> * * *

> This language suggests that even in situations where there is only de facto segregation, if the State adopts a policy which freezes these de facto conditions by imposing severe limitations on local school officials' discretionary authority to take effective remedial action, then the State policy constitutes State action serving to continue segregation in the schools and thus "significantly encourage[s] and involve[s] the state in private racial discrimination.
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> * * *
>
> We conclude that this type of State-imposed limitation on a school authority's discretion not only "operates to inhibit or obstruct the operation of a unitary school system" but also uses State power to promote and entrench racial separation in all those schools whose communities have segregated residential patterns."

Id. at 903-06 (citations omitted); see also id. at 904-05 (citing Lee v. Nyquist, 318 F. Supp. 710, 712 (W.D.N.Y. 1970) (invalidating a section of state education codes that "prohibit[ed] state education officials and appointed school boards from assigning students, or establishing, reorganizing, or maintaining school districts, school zones or attendance units for the purpose of achieving racial equality in attendance")).

Third, and finally, the SJC held that the anti-busing bill "also violates arts. 1 and 10 of the Declaration of Rights of the Massachusetts Constitution. The guaranties contained in these articles are at least as great as those guaranties provided in the equal protection clause of the federal constitution." Opinion of the Justices, 363 Mass. at 908; see also generally Herbert P. Wilkins, Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution, 16 Suffolk L. Rev. 887 (1980) (noting the independent significance of the state constitution).

The SJC retread this ground in 1974, when it rendered an opinion that proposed legislation to bar the Boston School Committee "from assigning children to schools on the basis of race, sex, or creed without parental consent" was unconstitutional. Opinion of the Justices, 365 Mass. 648, 659-50, 652-03 (1974) ("[A]s a constitutional matter, the bill now before us is virtually indistinguishable from the bill we found to be unconstitutional in our earlier opinion. Each is unconstitutional on its face because it serves to perpetuate existing segregation in some of the schools, regardless of its cause, and thus 'significantly encourage[s] and involve[s] the State' in racial discrimination") (citations omitted). Later that year, the Court employed similar reasoning to find that amendments to the Racial Imbalance Act could not forestall the implementation of a desegregation plan in Springfield. See School Comm., 366 Mass. at 327-29 ("[A]ny action taken by the Legislature or by the school committee of Springfield which would tend to reverse or impede the progress toward the achievement of racial balance in Springfield's schools would constitute a violation of the Fourteenth Amendment to the United States Constitution and of arts. 1 and 10 of the Declaration of Rights of the Massachusetts Constitution. . . . [E]ven where steps toward desegregation are made voluntarily rather than pursuant to constitutional mandate[,] any subsequent State action which would cause a return of the preexisting segregation would itself be an act of de jure segregation.").

The constitutional objections to the 1970s anti-busing legislation outlined above would apply with even greater force to the plaintiffs' reading of Article 111 in this case as a sweeping prohibition on race-conscious assignment policies in the schools. I do not hold definitively that this reading of Article 111 violates the federal constitution -- the issue is not fully joined and there is no need for me to reach it. The point is that the plaintiff's position provokes grave constitutional doubt, the SJC has recognized the

basis for that doubt, and the narrower "strict scrutiny" construction that the SJC has bestowed on language similar to Article 111 – which poses no obstacle to the Lynn Plan – would avoid those doubts.[112]

VI. CONCLUSION

This decision follows a very lengthy trial in which the defendants presented substantial evidence and data on the Lynn Plan and its ramifications. They did not seek to defend the Plan by referring to unsubstantiated generalizations about race relations, or the subjective perceptions of school officials. Nor did they rely on experts who knew everything about other systems in other parts of the country, but nothing about Lynn.

Rather, the defendants focused their attention, as they should, on this city, its school system, and the young children who attend it. They looked at it from the macro level – census data, surveys, statistics, and from the micro level – the heartfelt observations of the participants, children, teachers, administrators, parents.

The picture they painted not merely justified the Lynn plan as a constitutional matter. It celebrated the Plan and all the changes it has brought about in Lynn.

Nothing in the constitutional or statutory law of the United States or the Commonwealth of Massachusetts obliges me to dismantle the Lynn Plan and, in so doing, undermine defendants' commendable efforts to run a thriving, multiracial, and successful school system.

SO ORDERED.

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[112] With regard to the State Constitution, the SJC's determination that the anti-busing legislation violated Articles 1 and 10 of the Declaration of Rights would not necessarily preclude plaintiffs' reading of Article 111 because a subsequent amendment can repeal or curtail existing constitutional law. However, the canon of construing constitutional provisions "together to make a harmonious frame of government" supports a reading of Article 111 as an educational "cognate" of Articles 1 and 10 that simply subjects racial classifications in education to strict scrutiny.

Dated: September 5, 2003

/s/
NANCY GERTNER, U.S.D.J.

STATUTORY ADDENDUM

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws." 42 U.S.C. §1981(a).

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity." 42 U.S.C. §1983.

"If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U.S.C. §1985(3).

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case." 42 U.S.C. §1986.

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected

to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. §2000d.

MASSACHUSETTS RACIAL IMBALANCE LAW:

Mass.Gen.L. Chapter 15, §1I. Duties and Authority of Board of Education to Eliminate Racial Imbalance in Schools.

The board of education, in this section called the board, shall provide technical and other assistance in the formulation of plans to reduce or eliminate racial imbalance to be filed as provided by section thirty-seven D of chapter seventy-one, may approve such plans if they meet the requirements of said section thirty-seven D, and shall provide technical and other assistance for the implementation of approved plans and mandatory plans. If a school committee or a regional district school committee has failed to file with the board a plan within the time limit established by regulation of the board as provided by said section thirty-seven D or has filed a plan which does not meet the requirements of said section thirty-seven D, the board shall consult with and, after a public hearing, make specific recommendations for such a plan, together with an explanation of how such recommendations meet the requirements of said section thirty-seven D, to such school committee or regional district school committee, and such school committee or regional district school committee may file a revised plan in response to such recommendations; provided, however, that if the board has not approved such a plan or its revision within four months after the time limit established by such regulation of the board for its filing, the board may order that its recommendations shall be the mandatory plan to be implemented by such school committee or regional district school committee to meet the requirements of said section thirty-seven D. Any such recommendations and any such mandatory plan may include any of the following measures, and no others, to

meet the requirements of said section thirty-seven D: additions to existing school buildings, use of leased or portable facilities, and changes in use of school buildings.

If, following the receipt of notification from the board that racial imbalance exists, any school committee or regional district school committee does not show progress within a reasonable time in reducing or eliminating racial imbalance in its schools as provided by said section thirty-seven D, the commissioner of education shall not certify the amount of state aid for such city or town or for such towns which are members of such regional school district, as required by section five of chapter seventy, and the board shall not approve any project for school construction for such city, town, or regional school district under chapter 70B and the commissioner of education may notify the commissioner of revenue and the comptroller to hold such funds as have been so certified under said section five but have not been disbursed. Thereafter, upon receipt by the board of plans acceptable to it and showing progress within a reasonable time in reducing or eliminating racial imbalance in its schools as provided by said section thirty-seven D, the commissioner of education may notify the commissioner of revenue and the comptroller to pay any such withheld funds to such city or town in such amounts and at such times as he may designate, and the board may approve such projects.

The commonwealth shall, subject to appropriation and upon approval of the board, pay to a city, town or regional district school committee one hundred per cent of the cost of transportation of non-white pupils and minority pupils as defined in regulations promulgated under the federal Emergency School Aid Act, Public Law 92-318, as amended, transferred from schools in which racial imbalance exists and one hundred per cent of the cost of transportation of white pupils transferred from schools in which racial isolation exists to schools in which racial imbalance or racial balance exists for the purpose of reducing or eliminating racial imbalance as provided by said section thirty-seven D. The Commonwealth shall,

subject to appropriation and upon the approval of the board, also pay to a city, town or regional district school committee one hundred per cent of the cost of transportation of pupils for the purpose of reducing or eliminating an imbalance of minority students, as defined in regulations promulgated under the federal Emergency School Aid Act, Title VII of Public Law 92-318, as amended.

The board of education shall designate and administer a separate "Equal Education Improvement Fund" for each city, town or regional school district participating under the provisions of the act, to be known as the (name of city, town or regional school district) Fund. The Commonwealth shall, subject to appropriation, pay into such fund, five hundred dollars for each non-white pupil transferred from a school in which racial imbalance exists to a school in which racial isolation or racial balance exists, and five hundred dollars for each white pupil transferred from a school in which racial isolation exists to a school in which racial imbalance or racial balance exists for the purpose of reducing or eliminating racial imbalance.

The board shall establish guidelines by which the school committee of a city, town, or regional school district participating under the provisions of this act, may prepare and submit to the board for its approval, a plan(s) for a program(s) including an estimate of expenses necessary to implement such plan, to improve the quality of education in said city, town or regional school district. Upon approval of such plan or plans, the board shall designate that the amount needed for such plan be paid to the applying community from the Equal Education Improvement Fund of said city, town or regional school district.

The board may add to such funds such monies as are appropriated therefor and pursuant to regulations promulgated thereto and as requested of the Department for the purposes of voluntary transfers of students under Chapter 15, for magnent school programs, for minority

teacher and administrator recruitment and salary supplementation in the public schools, and for inservice teacher training projects.

Amendment effective July 1, 2000:

The 2000 amendment, by §35, in the second paragraph, substituted "70B" for "six hundred forty-five of the acts of nineteen hundred and forty-eight, as amended," and by § 36, deleted the third paragraph, which read: "The board shall, notwithstanding any contrary provision of chapter six hundred and forty-five of the acts of nineteen hundred and forty-eight, approve grants for schoolhouse construction of ninety per cent of the approved costs whenever the board is satisfied that the acquisition, construction, enlargement, renovation, reconstruction, rehabilitation, or modernization of a schoolhouse is for the purpose of reducing or eliminating racial imbalance as provided by said section thirty-seven D or imbalance of minority students, as defined in regulations promulgated under the federal Emergency School Aid Act, Title VII of Public Law 92-318; and the commonwealth shall, subject to appropriation and upon the approval of the board, pay to a city, town, or regional district school committee ninety per cent of the cost of other measures, except transportation as hereinafter provided of pupils, employed by a school committee thereof of such regional district school committee to provide places for pupils for the purpose of reducing or eliminating racial imbalance as provided by said section thirty-seven D or imbalance of minority students, as defined in regulations promulgated under the federal Emergency School Aid Act, Title VII of Public Law 92-318.".

Acts 1982, ch. 613, § 3, entitled "An act relative to school building assistance for growth communities, so-called", which was approved December 29, 1982, effective 90 days thereafter, provides as follows:

Section 3. Notwithstanding any provision of section one I of chapter fifteen of the General Laws or any other

general or special law to the contrary, the board of education may increase the amount of grants for school construction submitted or approved after December thirty-first, nineteen hundred and eighty-one and prior to July first, nineteen hundred and eighty-five to an amount not to exceed ninety per cent of the approved cost whenever the board is satisfied that the acquisition, construction, enlargement, renovation, reconstruction, rehabilitation or modernization of a schoolhouse is for the purpose of reducing or eliminating racial imbalance or imbalance of minority students; provided, however, that any such grant for an amount greater than seventy-five per cent of the approved cost shall be approved by the board of education with the concurrence of the house and senate committees on ways and means. For the purposes of this section, the term "minority student" shall mean persons who are American Indians and Alaskan Natives, Asians and Pacific Islanders, blacks, not of Hispanic origin, Hispanics, Franco-Americans, and Portuguese, and as determined by the commissioner of education, persons who are from environments in which the dominant language is other than English and who, as a result of language barriers and cultural differences, do not have an equal educational opportunity. (1983, 515, § 4; 1984, 65 § 4.).

Mass.Gen.L. Chapter 71, §37C. Declaration of Policy for Promotion of Racial Balance in Schools.

It is hereby declared to be the policy of the commonwealth to encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools. The prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing or altering of school attendance lines, establishing of grade levels, and the selection of new school sites.

Mass.Gen.L. Chapter 71, §37D. Definitions; Determination, Elimination, etc. of Racial Imbalance by School Committees.

As used in this section, sections thirty-seven C, I, and J, sections one I through one K of chapter fifteen, and section twelve A of chapter seventy-six, the following terms shall, unless the context requires otherwise, have the following meanings:

"Racial imbalance", the condition of a public school in which more than fifty percent of the pupils attending such school are non-white.

"Racial balance", the condition of a public school in which more than thirty percent but not more than fifty percent of the pupils attending such school are non-white.

"Racial isolation", the condition of a public school in which not more than thirty percent of the pupils attending such school are non-white.

"Exempt school", a public school to which, prior to January first, nineteen hundred and seventy-four, the passing of a competitive examination was a condition of entrance; provided, however, that the school committee or regional district school committee having jurisdiction over such school shall, under the supervision of the board of education, establish and maintain an affirmative action program to recruit and assist non-white students to enter and to remain in attendance at such school.

The school committee of each city, town, and regional school district shall annually, at such time and in such form as the commissioner shall determine, submit to the commissioner statistics sufficient to enable a determination to be made of the percent of white and non-white pupils attending all public schools and attending each public school under the jurisdiction of each such committee. Whenever the board of education, in this section called the board, finds that racial imbalance exists in a public school, it shall in writing notify the school committee or regional district school

committee having jurisdiction over such school that such finding has been made.

Any non-white pupil attending any public school in which racial imbalance exists shall have the right to be transferred to and to attend any other school, except an exempt school, of his parents' or guardian's choice for his grade level and under the jurisdiction of the same school committee or regional district school committee if racial isolation exists in such other school; and any white pupil attending any public school in which racial isolation exists shall have the right to be transferred to and to attend any other school, except an exempt school, of his parents' or guardian's choice for his grade level and under the jurisdiction of the same school committee or regional district school committee if racial imbalance exists in such other school. If a place is available for such pupil at such other school, such school committee or regional district school committee shall, forthwith upon receipt of written notice by his parents or guardian that they intend such pupil to exercise his right to be transferred to and to attend such other school, transfer such pupil to such other school. If no place is available for such pupil at such other school, such school committee or regional district school committee shall, upon receipt of such notice, formulate and, within the time limit established by regulations of the board, file with the board a plan to provide, within the same school year for which such notice is given, a place for such pupil at such other school and shall, within such time as may be prescribed by the board, implement either such plan as approved by the board or the mandatory plan of the board to provide such place and, when such place becomes available, transfer such pupil to such other school; provided, however, that the board may temporarily or permanently excuse such school committee or regional district school committee from implementing such plan or mandatory plan if an alternative place, satisfactory to the parents or guardian of such pupil, is available at another school to which such pupil may, as provided by this section, exercise his right

to be transferred and attend, or if the board finds that there is other good cause to do so. Whenever a school committee or regional district school committee determines, in accordance with regulations of the board, that the number of places available at such other school is exceeded by the number of pupils exercising their rights to be transferred to and to attend such other school, the selection of particular pupils to be transferred to such places as are available shall be in accordance with regulations of the board, which regulations shall reasonably provide for priority for non-white pupils attending schools in which more than seventy percent of the pupils are non-white, wihout affecting the rights of such pupils not so selected to be transferred to and to attend such other school as provided by this section.

Any such plan so filed shall set forth in detail the proposed changes in existing school attendance districts, additions to existing school buildings, use of leased or portable facilities, changes in use of school buildings, and other measures to provide a place for such pupil at such other school. Any such plan shall take into consideration on an equal basis with reduction or elimination of racial imbalance the safety of pupils in their travelling between school and home. Any such plan may provide for voluntary cooperation by other cities, towns, or regional school districts in making facilities available or otherwise rendering assistance in implementing such plan. No change in any existing school attendance district shall be made pursuant to any such plan prior to a public hearing. Notice of the time and place of such hearing and of its subject matter shall be given by mail, postage prepaid, to the parents and guardian of each pupil affected by the proposed change and either by publication in a newspaper of general circulation in the city, town, or regional school district within which such attendance district lies once in each of two successive weeks, the first such publication to be not less than fourteen days prior to the day of such hearing, or, if there is no such newspaper, by posting such notice in a conspicuous place in the city

or town hall of such city, town, or member towns of such regional school district for a period of not less than fourteen days prior to the day of such hearing. At such hearing any person, whether entitled to notice thereof or not, may appear in person or be represented by an agent who need not be an attorney.

The board shall adopt regulations for the administration of the provisions of this section relating to, but not necessarily limited to, determination of places available in schools, priorities for transfer and attendance, notification to parents and guardians of pupils of such pupils' rights to transfer and attendance, reporting and publication of places available in schools, time limits for filing of plans to provide places for pupils in schools, consolidation of such plans for filing, time limits and schedules for implementation of approved or mandatory plans to provide such places, progress reports on such implementation, and affirmative action programs.

The supreme judicial and superior courts shall have jurisdiction in equity over actions commenced by the board or by or on behalf of any pupil to enforce the provisions of this section; provided, however, that in any such action commenced by or on behalf of any pupil to enforce his right, as provided by this section, to be transferred to and to attend any school, which action is concluded in favor of such pupil, the school committee or regional district school committee having jurisdiction over such school shall be liable to such pupil or the person commencing such action on his behalf for his costs and reasonable attorney's fees.

Mass.Gen.L. Chapter 71, §37I. Magnet School Facility; Establishment; Application for Grant.

Notwithstanding any contrary provisions of law, including, but not limited to, chapter six hundred forty-five of the acts of nineteen hundred and forty-eight, as amended, the board of education, in this section and

section thirty-seven J called the board, may, subject to appropriation, make grants for the cost of providing magnet school facilities. For the purpose of this section, the term "magnet school facility" shall mean a public school or part thereof which meets such requirements as may be established by the board and attracts pupils from outside the neighborhood in which it is located for the purpose of reducing or eliminating racial imbalance or racial isolation, as defined in section thirty-seven D.

The school committee of any city or town or any regional district school committee may apply to the board for a grant to such city, town, or regional district school committee for all or part of the cost of providing a magnet school facility. Such application shall be in such form as may be prescribed by the board and shall be accompanied by such estimates and other information as the board may require. The board may approve any such application for a facility which meets such requirements and which is likely so to attract pupils so as to reduce or eliminate racial imbalance or racial isolation. The board shall notify such school committee or regional district school committee of its approval or disapproval of such application and, in the case of approval, of the estimated amount of the grant which the board will make.

After notification of approval, the board and such school committee or regional district school committee may enter into an agreement providing that such school committee or regional district school committee shall provide, within a reasonable time, such magnet school facility, as approved by the board, and that the commonwealth shall pay to such city, town or regional district school committee the amount of such grant. Any such agreement shall provide that such facility shall be operated in a manner designed to achieve racial balance therein or at the public school of which such facility is a part and that, whenever such school committee or regional district school committee determines, in accordance with regulations of the board, that the number of places available at such facility or school is

exceeded by the number of pupils who have applied to be transferred to and to attend such facility or school, the selection of particular pupils to be transferred to and to attend such facility or school shall be in accordance with regulations of the board, which regulations shall reasonably provide for priority for those non-white pupils who are attending or otherwise would attend a racially imbalanced school and for those white pupils who are attending or otherwise would attend a racially isolated school.

The board may, subject to appropriation, make grants for the cost of providing magnet school facilities for the purpose of reducing or eliminating imbalance of minority students, as defined in the regulations promulgated under the federal Emergency School Aid Act, Title VII of Public Law 92-318, as amended.

The following costs of providing a magnet school facility shall be eligible for any such grant:

(i) the average cost per pupil of educating each child who attends such facility or the public school of which such facility is a part, less the average cost per pupil of educating each such child at the public school which he otherwise would have attended; provided, however, that such costs shall be determined according to a method approved by the board, and that, to the extent possible, such method shall determine the average cost per pupil of educating each such child in the grade in which he is enrolled;

(ii) the cost of transportation of each child attending such magnet school facility;

(iii) the cost of planning and construction, reconstruction, enlargement, rehabilitation, or other improvement for the magnet school facility provided, however, that no such grant shall be for more than seventy-five percent of any such cost and

(iv) such other costs incidental to the provision of the magnet school facility as the board may approve.

The board may adopt regulations for the administration of the provisions of this section.

Mass.Gen.L. Chapter 71, §37J: Magnet Educational Programs; Reimbursement of City, Town or Regional District.

The board of education may, subject to appropriation, reimburse any city, town or regional district for all or part of the cost of providing magnet educational programs within the public schools. Any such reimbursement shall be made only after certification by the board that such cost actually has been incurred, that such cost is reasonable, and that such program has met such requirements.

For the purpose of this section, the term "magnet educational program" shall mean educational measures including, but not limited to, planning and special services, instruction, or treatment of children, whether at the public schools or other public or private facility or place, which meet such requirements as may be established by the board for the purpose of providing such children with racially balanced educational experiences.

The board of education may contract with any other public or private facility for the purpose of purchasing magnet educational programs. Any city, town or regional district wanting to join in such a program shall so request the board in writing. The board shall approve all requests that meet the requirements as may be established. Any such contracts must be approved by a majority of the board provided that such cost is reasonable.

No. 05-348

2005

IN THE

Supreme Court of the United States

SAMANTHA J. COMFORT, ET AL.,
Petitioners,

v.

LYNN SCHOOL COMMITTEE, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the First Circuit correctly applied settled law, including the Court's decision in Grutter v. Bollinger, 539 U.S. 306 (2003), in determining that: (a) the City of Lynn, Massachusetts has a compelling interest in its race-conscious (not race-preferential) plan, which guarantees all students, regardless of race, the right to attend their neighborhood school, and integrates its schools only by using voluntary, noncompetitive transfers to educationally comparable schools; and (b) Lynn's Plan is narrowly tailored to achieve its compelling interest in producing the significant educational benefits of integration and protecting its students from the harms of racial isolation and segregation, is review by this Court appropriate?

2. Where the First Circuit's decision does not conflict with decisions of other circuits and agrees with the two other Courts of Appeals' decisions involving similar educational contexts and interests decided after the Court's decision in Grutter, is review by this Court appropriate?

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In the
Supreme Court of the United States

SAMANTHA J. COMFORT, ET AL.,
Petitioners,

v.

LYNN SCHOOL COMMITTEE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the *en banc* Court of Appeals for the First Circuit (Pet. App. 1-50) is reported at 418 F.3d 1 (1st Cir. 2005).[1] The United States District Court's decision (Pet. App. 98-220) is reported at 283 F.Supp.2d 328 (D. Mass. 2003).

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on June 16, 2005. The petition for a writ of certiorari in No. 05-348 was filed on September 14, 2005. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) (2000).

[1] "Pet. App." refers to the appendix to the Petition in No. 05-348.

STATEMENT OF THE CASE

1. Lynn is an urban school system with over 15,000 students attending twenty-five schools. It has eighteen elementary schools, four middle schools, and three high schools. All Lynn's schools provide comparable educational quality, resources, and curriculum and are equally successful in providing an education to Lynn's students. At the time of trial in June 2002, 42% of Lynn's students were white and 58% nonwhite--29% Hispanic, 15% African-American, and 14% Asian-American.

In 1987, Lynn adopted a voluntary plan to integrate its schools. Lynn's Plan gives every parent the ability to send his or her child, regardless of race, to that child's neighborhood school. Approximately two-thirds of students' parents make that choice. A student's race is considered and used as a decisive factor only when Lynn is approving parents' voluntary requests for school transfers, and only then in certain circumstances. Lynn applies the same school assignment rules to all its students, whether white or nonwhite. Lynn's race-conscious plan regulates only requests for non-competitive, elective school transfers to non-neighborhood schools that have a segregative effect on Lynn's schools and students, i.e., when the transfer would exacerbate "racial isolation" or "racial imbalance," as defined by the Plan, in a particular school.[2] Whenever a school's racial composition falls within +/- 15% for elementary or within +/- 10% for middle and

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[2] The Plan defines a "racially isolated" elementary school, for example, as one where the percentage of minority students in the school falls more than 15% below the school district's overall minority composition and a "racially imbalanced" elementary school as one where the percentage of minority students is more than 15% above the school district's overall minority composition in that school year. Pet. App. 7-8, 126-27.

high schools of the district's overall racial composition, there are no limits on transfers for that school ("neutral transfers"). For example, since 1992, the Plan's transfer restrictions have been applicable only to Lynn's elementary and middle schools. Lynn's three high schools have remained integrated without the transfer restrictions. Moreover, before race is used in a transfer decision, Lynn accounts for a number of individualized, race-neutral factors, including a student's place of residence, school attendance zones, a sibling's school assignment, whether a "neutral transfer" applies, class size, space availability, and the student's language or special education needs. Parents can appeal transfer denials. A small number of segregative transfer appeals are made each school year. Appeals are approved when parents document a significant health, safety, or other hardship from denial of the requested transfer. Roughly 50% of appeals are successful. Pet. App. 6-8, 28-29, 101, 125-32; Stipulations, ¶¶ 6-9, 15-16, 23-31, 55-58.

2. Lynn first adopted its Plan in 1987 when its *de facto* segregated school system was deeply troubled. In the Lynn school district, which was 26% nonwhite in 1987, most of its schools were overwhelmingly white, with many over 90% white. Nonwhite students were concentrated in four of its eighteen elementary schools and one middle school. Lynn's schools were also beset with (a) racial strife and interracial violence between its white and nonwhite students, (b) poor academic performance, (c) low attendance rates, (d) high rates of discipline, and (e) low community confidence in the school system. Lynn also experienced significant white flight, with white enrollment declining by an average of 5% each year for the ten years preceding the Plan. Compared to Lynn's predominantly white schools, schools with high minority student concentrations had significantly inferior educational conditions. As expert testimony established, racial isolation, segregation, and racially identifiable schools (schools with racial makeups

significantly different from the overall racial composition of a school district) were the essential factors in generating Lynn's myriad education, school safety, and race relations problems.[3] To counteract these dire conditions and provide the benefits of an integrated education, Lynn adopted its Plan. Pet. App. 5-6, 19, 102-03, 119-25, 138-39, 175.

3. Today, by all measures, Lynn's school system is thriving. In a district with a high percentage of minority and low-income students,[4] Lynn has achieved significant educational and academic achievement gains throughout its school system, most particularly for students attending schools in Lynn's urban center. It has improved students' motivation to learn and learning outcomes. Schools have uniformly high attendance rates and declining suspension rates, with extraordinarily low levels of student conflict, crime, and violence. Race relations among students are very positive. Students are much more prepared to succeed in racially diverse colleges and workplaces and live in racially diverse communities. Lynn schools no longer have a problem with white flight. Pet. App. 9, 19-22, 27, 103, 134-36, 175-76, 219. Expert testimony established that Lynn's integration plan was essential to generating these significant improvements in education, school safety, and race relations since the Plan was adopted. Pet. App. 19-22, 27, 29-31, 103, 134-45, 175-77, 181-85.

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[3] When adopting its Plan, Lynn identified eliminating racial isolation as a primary goal to reduce the conflicts and violence between its white and nonwhite students and to enable it to achieve all the hoped-for educational improvements. See Ex. A-J, Lynn's Plans; Stipulations, ¶ 124.

[4] Minorities constituted 58% of the overall student population in the 2001-02 school year, compared with only 26% in the 1987-88 school year; 65% of students' families lived at or near the poverty level in the 2001-2002 school year. Pet. App. 6, 122, 131-32.

4. Following an eleven-day bench trial, the District Court issued its opinion concluding that the Lynn and state defendants provided overwhelming evidentiary support establishing Lynn's compelling educational, school safety, and race relations needs for its school integration plan. The District Court also held that the Plan was narrowly tailored to achieve Lynn's compelling goals. Pet. App.10, 18, 174-203.

On appeal, a three-judge panel of the First Circuit Court of Appeals concluded that "defendants have made a persuasive case that a public school system has a compelling interest in obtaining the educational benefits that flow from a racially diverse student body." Pet. App. 76. The panel held, however, that Lynn's Plan was not narrowly tailored. Pet. App. 11, 86. The First Circuit withdrew the panel decision. 2004 WL 2348405 (1st Cir. Oct. 20, 2004), withdrawn, (Nov. 24, 2004); Pet. App. 96-97.

In June 2005, the First Circuit issued its *en banc* opinion, holding that Lynn's Plan met constitutional requirements. Pet. App. 15-34. The *en banc* First Circuit Court, relying on Grutter v. Bollinger, unanimously held that Lynn had a compelling interest in obtaining the substantial educational benefits that flow from its school integration plan. Pet. App. 19-22. Except for one ground, the five members of the *en banc* court also unanimously agreed that Lynn's integration plan was narrowly tailored. The two dissenting judges stated that Lynn erred by using race as a decisive factor in some school transfer decisions, rather than as "a strong but non-determinative 'plus' factor for integrative transfers."[5] Pet. App. 50. The *en banc* court, relying on

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[5] The two dissenting judges were members of the original three-judge panel. Pet. App. 46, 51. Petitioners not only rely heavily on the withdrawn panel decision for arguments in their petition, Pet. Br. 22, 25-28, but petitioners also fail to note that after rebriefing and reargument to the *en banc* court, the judges dissented on only

Grutter, concluded that individualized consideration of each student is unnecessary in this educational context. Taking into account the context and compelling interests advanced here, the court stated that "(t)he concerns motivating the individualized consideration requirement in a competitive, race-preferential admissions context . . . are simply not present in a non-competitive K-12 transfer policy aimed at racial diversity." Pet. App. 25.

ARGUMENT

I. THE COURT SHOULD NOT GRANT REVIEW BECAUSE THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS OR THIS COURT.

The First Circuit's decision here does not conflict with any decision of this Court or any other Court of Appeals. Petitioners' argument to the contrary is flawed for three reasons: (1) it relies on cases involving significantly different contexts and interests from those presented here; (2) it relies on decisions preceding Grutter v. Bollinger, where the courts followed the limited constitutional guidance of school desegregation cases and Regents of University of California v. Bakke, 438 U.S. 265 (1978); and (3) it relies on two withdrawn First and Ninth Circuit Court panel decisions.[6]

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one ground, rather than the four grounds in the panel decision. Pet. App. 46-50, 86.

[6] The First Circuit's panel decision here was withdrawn. 2004 WL 2348505 (1st Cir. Oct. 20, 2004), withdrawn, (Nov. 24, 2004); Pet. App.96-97. Similarly, the Ninth Circuit's panel decision was withdrawn after a petition for rehearing *en banc* was granted. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 377 F.3d 949 (9th Cir. 2004), reh'g *en banc* granted, 395 F.3d 1168 (9th Cir. 2005). The Ninth Circuit recently reversed in substance

Three circuit courts since Grutter (the First, Sixth, and Ninth Circuits) have addressed K-12 integration policies involving similar contexts and interests and have decided the constitutional questions consistently. These circuits have recognized the compelling interest in integration in K-12 schools and have identified similar considerations that must be taken into account in a narrow tailoring inquiry in the K-12 context under the Equal Protection Clause of the Fourteenth Amendment. For example, in Parents Involved in Community Schools v. Seattle School District No. 1, No. 01-35450, 2005 WL 2679585 (9th Cir. Oct. 20, 2005), the *en banc* Ninth Circuit recently upheld the constitutionality of Seattle, Washington's voluntary integration plan for high school assignments. Similarly, the Sixth Circuit affirmed the constitutionality of Louisville, Kentucky's race-conscious, K-12 school assignment policy for educationally comparable schools in McFarland v. Jefferson County Public Schools, 330 F.Supp.2d 834 (W.D. Ky. 2004), aff'd, 416 F.3d 513 (6th Cir. 2005) (*per curiam*), reh'g and reh'g *en banc* denied (Oct. 21, 2005). Moreover, the Second Circuit, in Brewer v. West Irondequoit Central School District, 212 F.3d 738, 749, 752-53 (2nd Cir. 2000), which preceded Grutter, also concluded that educators have a compelling educational interest in reducing racial isolation in K-12 schools through race-conscious means.

Neither of the Ninth Circuit's decisions that petitioners rely upon, Smith v. University of Washington, 392 F.3d 367 (9th Cir. 2004), cert. denied, 126 S.Ct. 334 (Oct. 3, 2005), and Doe v. Kamehameha Schools, 416 F.3d 1025 (9th Cir. 2005), establishes a conflict within the federal circuits. They concern entirely distinct contexts, facts, and interests from those applicable here. Smith involved a competitive, race-preferential

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the panel decision, No. 01-35450, 2005 WL 2679585 (9th Cir. Oct. 20, 2005) (*en banc*).

admissions program to a state law school. Doe involved a race-preferential admissions policy to a private school that required the exclusive admission of students of native Hawaiian ancestry. Another case petitioners cite, Cavalier v. Caddo Parish School Board, 403 F.3d 246 (5th Cir. Mar. 1, 2005), as amended on denial of reh'g and reh'g *en banc* (Mar. 29, 2005), is also inapposite. Cavalier concerned a school district's mistaken reliance on an expired 1981 court desegregation decree to justify its race-preferential magnet schools admissions program.

Moreover, in important ways, cases like Tuttle v. Arlington County School Board, 195 F.3d 698 (4th Cir. 1999), cert. dismissed, 529 U.S. 1050 (2000), Eisenberg v. Montgomery County Public Schools, 197 F.3d 123 (4th Cir. 1999), cert. denied, 529 U.S. 1019 (2000), and Cavalier arise in contexts distinct from this case. Each of those cases involved the distribution of a discrete, limited governmental benefit. Tuttle involved admission to kindergarten in a special alternative school; Eisenberg, transfer to a special math and science magnet school; Cavalier, transfer to a special magnet school. These cases may require a different legal analysis from Lynn's noncompetitive, race-conscious transfer policy to educationally comparable non-neighborhood schools. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204-10 (1995) (government contract procurement); Richmond v. J.A. Croson, 488 U.S. 469, 493 (1989) (same); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 270-73 (1986) (teacher employment).

The petitioners cannot establish a conflict among circuit courts. Moreover, since circuit courts are still in the process of resolving the question of the constitutional significance of the differences between the higher education and the K-12 contexts in applying the Grutter Court's narrow tailoring requirements, granting review here would be premature.

II. THE FIRST CIRCUIT'S DECISION PROPERLY APPLIED SETTLED LAW TO LYNN'S K-12 EDUCATIONAL CONTEXT.

A. The First Circuit Correctly Applied Grutter v. Bollinger in Concluding that Lynn Has a Compelling Interest in Racially Integrating its K-12 Schools.

The *en banc* First Circuit Court correctly relied on Grutter v. Bollinger in unanimously holding that Lynn had a compelling governmental interest in racially integrating its elementary and secondary schools. Pet. App. 17-22. The court found that the interests Lynn advances in this K-12 educational context "bear a strong familial resemblance" to many of the educational interests the Grutter Court found compelling for higher education.[7] Pet. App. 21. The First Circuit also found that the benefits that flow from the racial integration of Lynn's schools are distinct from those in higher education and are even more compelling in the K-12 educational context. Pet. App. 18-22. The court cited the overwhelming evidence establishing the positive impact racial integration has on student safety and attendance, which are important and distinctly different educational interests from those that institutions of higher education advance for promoting racial diversity.

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[7] The Court in Grutter v. Bollinger cited findings that "the Law School's admissions policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races." 539 U.S. at 330. The Grutter Court further relied on the "numerous studies show[ing] that student body diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." Id. (internal citations omitted). The First Circuit concluded that Lynn students receive these same benefits when educated in Lynn's racially integrated K-12 schools. Pet. App. 21-22, 22 n.8.

Pet. App. 22. The court also found that racial isolation and segregation can adversely affect school attendance and academic performance of minority students in K-12 schools and that "these effects can be combated by racial integration." Pet. App. 19. The First Circuit concluded that Lynn's Plan not only improved educational opportunities for all students but also generated "higher attendance rates, declining suspension rates, a safer environment, and improved standardized test scores -- since the Plan's inception." Pet. App. 19. At trial, petitioners "concede[d] the importance of these goals." Pet. App. 176.

The Grutter Court did not recognize only viewpoint diversity or "true educational diversity" as a compelling interest, as Petitioners argue, Pet. Br. 12; rather, the Grutter Court also recognized racial diversity in public education as a compelling interest. As the First Circuit correctly concluded, Grutter is not "limited to the benefits that flow from viewpoint diversity in the higher education context" but "extend[s] to the benefits that flow from racial diversity in the K-12 context" (emphasis in original). Pet. App. 21. The First Circuit emphasized that the differences in compelling interests between higher education in Grutter and K-12 schools here are the "logical result of context." Pet. App. 22. Although petitioners are correct that Grutter relied in substantial part on the First Amendment's right to "academic freedom" and the "educational autonomy" of institutions of higher learning, they fail to recognize that this Court also rooted its decision in government's constitutional interest in promoting racial diversity in public education. 539 U.S. at 327-33, 338. Grutter relied heavily on landmark decisions involving elementary and secondary school education, stating that this Court has long recognized, since Brown v. Board of Education, 347 U.S. 483, 493 (1954), the government's powerful interest in promoting racial diversity in the K-12 setting. Grutter, 539 U.S. at 331 (citing Plyler v. Doe,

457 U.S. 202, 221 (1982)).

The Grutter Court concluded that attaining a racially diverse student body is essential for the University of Michigan Law School to achieve its proper institutional mission, 539 U.S. at 328; similarly, the First Circuit concluded that the benefits from racially integrating its schools are central to Lynn's achievement of its proper educational mission.[8] Pet. App. 19-22, 27.

B. The First Circuit's Narrow Tailoring Analysis is a Factually-Driven Application of Settled Law.

Consistent with the Grutter Court's admonition that the very purpose of strict scrutiny is to take relevant differences in the context and interests advanced into account, Grutter, 539 U.S. 306, 336 (2003), the First Circuit engaged in a rigorous, context-specific narrow tailoring inquiry. Pet. App. 22-34.

1. The First Circuit correctly applied Grutter's teachings in holding that the Court's narrow tailoring requirements for competitive, race-preferential higher education admissions programs do not prohibit Lynn

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[8] The petitioners mischaracterize the record and the First Circuit's opinion by arguing that Lynn uses its Plan to address societal discrimination and to provide students with role models from the same race. Pet. Br. 16. As the parties stipulated at trial:

> The government interests identified by Lynn in its Plan include fostering integrated public schools and what Lynn believes are [their] positive effects; reducing minority isolation and avoiding segregation and what Lynn believes are their negative effects; promoting a positive racial climate at schools and a safe and healthy school environment; fostering a cohesive and tolerant community in Lynn; promoting diversity; ensuring equal educational and life opportunities and increasing the quality of education for all students.

Pet. App. 18; Stipulations, ¶ 126.

from using race as a decisive factor in school-transfer decisions. Pet. App. 22-27. As the court held, "[i]f a non-competitive voluntary student transfer plan is otherwise narrowly tailored, individualized consideration of each student is unnecessary." Pet. App. 27. "The concerns motivating the individualized consideration requirement in a competitive, race-preferential admissions context that focuses on diversity along a number of axes (e.g., the Gratz and Grutter policies) are simply not present in a non-competitive K-12 transfer policy aimed at racial diversity." Pet. App. 25.

Where viewpoint diversity is the educational institution's goal, as in Grutter, 539 U.S. at 314-16, 337-38 (competitive, race-preferential law school admissions), and Gratz v. Bollinger, 539 U.S. 244, 253-57 (2003) (competitive, race-preferential university admissions), it makes sense to require an individualized, holistic assessment of candidates to determine how each may contribute to the overall educational or viewpoint diversity on campus. Lynn's interest, however, is not to achieve the benefits of viewpoint diversity, relevant to institutions of higher education or select exam schools, where educators seek to admit students with broadly diverse backgrounds, qualifications, and experiences to exchange perspectives and ideas and enrich the overall educational experience. Pet. App. 24-26, 184-85 n.90. Petitioners argue nevertheless that the First Circuit should have required Lynn to adopt a narrow tailoring requirement ("true educational diversity") unrelated to Lynn's achievement of its Plan's purpose. The First Circuit, however, correctly concluded that a student's background and qualifications apart from race are irrelevant to Lynn's achievement of the compelling educational benefits of racial integration and prevention of racial isolation and segregation in this K-12 educational context. Pet. App. 24-26 (citing Brewer v. West Irondequoit Central School District, 212 F.3d 738, 752 (2nd Cir. 2000) ("If reducing racial isolation is - -

standing alone - - a constitutionally permissible goal, . . . then there is no more effective means of achieving that goal than to base decisions on race.")). Pet. App. 25.

Moreover, Lynn's individualized review of transfer requests is consistent with Grutter and appropriate for this educational context and the interests Lynn advances. Lynn takes into account individualized, race-neutral factors, including a student's place of residence, school attendance zones, a sibling's school assignment, whether a "neutral transfer" applies, class size, space availability, and the student's language or special education needs before race is used as a decisive factor in a transfer decision. Pet. App. 6-8, 6 n.3, 125-28; Stipulations, ¶¶ 31, 36, 37, 42-43.

Additionally, the remaining assortment of complaints advanced by petitioners do not lead to the conclusion, singly or in combination, that the First Circuit misapplied the Court's holdings in Grutter or Gratz. Lynn's Plan is not a "flagging program."[9] Pet. Br. 21. Lynn's Plan does not insulate candidates from competition, in that, unlike in Gratz, Lynn's school transfers are not competitive or race-preferential, and Lynn does not seek to determine if applicants for school transfers would contribute to viewpoint diversity, because viewpoint diversity is not an interest Lynn advances in racially integrating its schools. Pet. App. 24-26, 184–85 n.90.

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[9] The petitioners contend that Lynn unconstitutionally employs a dual assignment system by "subject[ing] children of the disfavored race to a separate assignment process . . . ." Pet. Br. 21. On the contrary, the parties stipulated that Lynn's Plan has no "disfavored race," Stipulations, ¶ 106, and that "[s]tudents in all racial classifications . . . have the same school assignment rules applied to them . . . regardless of their race or ethnicity." Stipulations, ¶ 15.

Likewise, there is no merit to petitioners' repeated assertion that Lynn's use of race as a decisive factor in some transfer decisions reinforces racial stereotypes and causes Lynn's students to experience stigmatic harm. Pet. Br. 12-16. The petitioners' argument conflicts with the District Court's findings of fact and is unsupported by the record. Lynn's Plan, "by reducing racial isolation and increasing intergroup contact," has "ameliorated racial and ethnic tension and bred interracial tolerance."[10] Pet. App. 27; see also Pet. App. 19-22, 32, 100, 103, 134-36, 138-43, 176-77; Stipulations, ¶¶ 112-14, 116.[11]

This case is also distinguishable from affirmative action cases involving competitive admissions or distribution of a limited benefit where some form of preferential treatment of nonwhites, some might argue, may reinforce the stereotype that nonwhites cannot compete with whites on the basis of merit or that they need special governmental assistance to succeed. Pet. App. 25-27, 101, 184-85 n.90; Grutter, 539 U.S. at 317; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228-29 (1995); Richmond v. J.A. Croson, 488 U.S. 469, 493 (1989).

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[10] Petitioners make certain allegations regarding two sisters, "Keana and Kearra," although their story does not appear in the record in this case. Pet. Br. 15. (Although petitioners suggest that Lynn designates students' race under its Plan, this is incorrect. Parents are responsible for identifying their child's race upon admission to the school system, not Lynn. See Stipulations, ¶¶ 39, 186, 190, 193, 196, 200, 203.)

[11] The petitioners' reliance on Johnson v. California, 125 S.Ct.1141 (2005), Pet. Br. 14, is also misplaced. As the First Circuit recognized, Johnson involved a state prison policy that imposed racial segregation, a practice long rejected in our country's jurisprudence. This case, on the other hand, involves racial integration in K-12 schools, long recognized since Brown v Board of Education as providing fundamentally important educational and citizenship benefits. Pet. App. 26-27.

2. The First Circuit correctly concluded that Lynn satisfies the requirements of settled law where it takes into account students' race no more than necessary to achieve the educational benefits its Plan is designed to produce and to prevent the educational harms of segregation, racial isolation, and racially identifiable schools.[12] See Grutter, 539 U.S. at 333, 335-36. Pet. App. 29-32, 119-24, 139-40, 144, 176-77, 184.[13] Moreover, the First Circuit did not find persuasive petitioners' argument, Pet. Br. 17, that Lynn's educational improvements are not attributable to racial diversity because all Lynn schools maintain positive educational conditions, even with varied racial compositions. Pet. App. 27 n.11; see also Pet. App. 143-44 n.55, 184-89; Stipulations, ¶ 48.

3. Additionally, the First Circuit correctly applied settled law to the facts presented in concluding that Lynn's administrators gave serious, good faith consideration to race-neutral alternatives and, consistent with Grutter, 539 U.S. at 339-40, determined that no workable or feasible alternative exists for Lynn to achieve the Plan's compelling goals without the

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[12] If Lynn's intent had just been to balance racially its schools, it would have eliminated its percentage ranges altogether and employed involuntary transfers to ensure that many of its schools had student populations as close as possible to 50% white and 50% nonwhite, or to ensure that each school's composition mirrored the racial composition of Lynn's aggregate school population.

[13] As the First Circuit correctly concluded, even though a few Lynn schools do not invariably maintain a "critical mass," or at least 20% of white and nonwhite children, students for all or the most substantial parts of their education attend schools with a critical mass. In those circumstances, students do not forfeit the long-term educational and race relations gains of integration when they then attend a school with a relatively short-term or marginal deviation from critical mass. Pet. App. 27 n.11; see also Pet. App. 143, 143-44 n.55, 184-90.

race-conscious means it currently employs, and without sacrificing its neighborhood-based school system and other important educational and practical objectives. Pet. App.33-34; see also Pet. App. 190; Grutter, 539 U.S. at 340 (in adopting alternatives, law school need not "effectively sacrifice all other educational values" or "a vital component of its educational mission"). Lynn "seriously considered, and plausibly rejected, a number of race-neutral alternatives," Pet. App. 33, including: (1) a strict neighborhood-based assignment plan without transfers; (2) a freedom of choice assignment plan; (3) a lottery-based assignment system; (4) a district assignment plan with magnets; (5) a socioeconomic-based assignment system; (6) a controlled choice plan (which may require involuntary transfers and forced busing); and (7) a redrawing of school attendance zones. As the First Circuit determined, none of these alternatives is feasible because of the segregative housing patterns in Lynn, the wide geographic separation between the predominantly white and minority sections of Lynn, and the persistent pattern of segregative school requests by Lynn parents. Pet. App. 33-34; see also Pet. App. 130, 130 n.41, 144-45, 190, 195-99, 200-01 n.101. Therefore, petitioners fail to advance any persuasive ground here for this Court's review of the First Circuit's application of settled law to these facts.

4. Finally, the First Circuit correctly applied settled law to the facts in concluding that Lynn satisfies the narrow tailoring requirement that a plan "be limited not only in scope, but also in time" by performing ongoing periodic reviews to determine whether its Plan is still necessary to maintain integration and prevent racial isolation and segregation. Pet. App. 32-33; Grutter, 539 U.S. at 341-42. Consistent with Grutter, the First Circuit concluded that Lynn regularly reviews the extensive data collected about every component of the Plan's operation, its schools, and its students, and

regularly analyzes its extensive data to determine the effect of terminating the Plan on school integration. Pet. App. 32-33; see also Pet. App. 129-30. The First Circuit also correctly observed that Lynn applies a built-in mechanism for limiting or ending its use of race, resulting, for example, in the Plan's restrictions not applying to Lynn's high schools since 1992. Pet. App. 32-33; see also Pet. App. 178; Stipulations, ¶ 16. Moreover, although it has not set a specific termination date, Lynn will limit the Plan's duration, as events warrant (demonstrated by Lynn's record of reducing its use of race-conscious components). See Pet. App. 32-33, 124-30, 178; see also Grutter, 539 U.S. at 342-43. Therefore, petitioners fail to present any persuasive ground here for this Court's review of the First Circuit's application of these facts to settled law.

CONCLUSION

For the reasons stated, this Court should deny the petition.

Respectfully submitted,

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05-348
NO.

IN THE

Supreme Court of the United States

SAMANTHA J. COMFORT, ON BEHALF OF
HER MINOR CHILD ELIZABETH NEUMYER, ET AL.,

Petitioners,

v.

THE LYNN SCHOOL COMMITTEE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

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I. Clarification is needed on whether the Respondents' reading of *Grutter* conflicts with other decisions disapproving the use of racial classifications designed to maintain racial diversity/racial balancing.

The *Respondents' Brief in Opposition to the Petition for Writ of Certiorari* typifies the effort by some to stretch this Court's decision in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), to permit the use of racial classifications in order to maintain racial balancing. The Respondents insist:

> The Grutter Court did not recognize only viewpoint diversity or "true educational diversity" as a compelling interest, as Petitioners argue, Pet. Br. 12; rather, the Grutter Court also recognized racial diversity in public education as a compelling interest.

Opposition Brief, p.10. The First Circuit's decision adopts this expansive view. But this reading of *Grutter* is both inconsistent with that decision ("The [law school] policy does not define diversity 'solely in terms of racial and ethnic status'" *Grutter*, 539 U.S. at 316) and contradicts this Court's earlier decisions concerning racial balancing.

In *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.* this Court held:

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.

402 U.S. 1, 24 (1971). Racial diversity is inappropriate because "the first remedial responsibility of school authorities is to eliminate invidious racial distinctions." *Id.* at 18. Racial diversity perpetuates racial distinctions, rather than eliminating them because children are taught that race dictates how they be treated, rather than their individual needs or characteristics.

After holding that perpetual racial balancing would exceed even the remedial power of the courts, this Court explained: "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race." 402 U.S. at 23. Regardless of how "pupil of a racial minority" is defined, children are excluded from certain Lynn schools because of their race. This is true whether "racial minority" is defined numerically (children classified as "white" make up only 38% of Lynn's student population) or using the Plan's definition of "minority" (Black/African-American, Asian, Hispanic, or Native American).

The impact of expanding *Grutter* so as to reverse the general prohibition against assigning children by skin color cannot be overstated. Racial diversity, as a compelling interest, would not be limited to school systems that have identified some particular constitutional failing that needs to be remedied through the temporary use of a racial classification. This interest is so expansive as to permit the virtually limitless use of race-based assignments in public schools. If maintaining racial diversity justifies the inflexible mechanical use of race-based assignment processes, as held in the present case, then it is hard to conceive of any public school system across the country that would not be free to assign students race.

II. The Lynn Plan uses a racial quota.

While Lynn attempts to portray its student assignment plan as merely "race conscious" rather than race-preferential, the Respondents admit "[a] student's race is considered and used as a decisive factor" when a parent seeks to have their child participate in Lynn's school choice program. *Opposition Brief*, p.2. While Lynn's racial restrictions discriminate equally against all races, the fact is that at some of Lynn's schools, children classified as "minorities" are not permitted transfers, and

at other schools, children classified as "non-minorities" are not permitted transfers. *En Banc Opinion*, App.7-8. This is not merely being conscious of race; Lynn denies participation in school choice based on skin color. *See e.g. Stipulation of Fact No. 44* (because of the Plan's racial restrictions "Minority students attending the Lynn Woods elementary school . . . did not have the option of an out-of-district assignment (unless to unite siblings or extreme hardship could be demonstrated)").

The +/-15% variance used by Lynn is a quota. It insulates children from comparison with children who belong to the disfavored race for a particular school. *Grutter*, 539 U.S. at 334 (quotas "insulat[e] . . . applicants with certain desired qualifications from competition with all other applicants"). The quota may change from year to year, but for each school there is a desired racial percentage. If a child's assignment will be contrary to that racial percentage, it will be rejected. This is a quota.

III. The Respondents take contradictory positions on the applicability of *Grutter*.

The Respondents shift between arguing on the one hand that *Grutter* applies to the Lynn Plan – in an effort to justify the conclusion that diversity measured by race alone is a compelling interest – to arguing on the other hand that *Grutter* does not apply because Lynn's interest is not the same as the viewpoint diversity interest approved in *Grutter* – in an effort to avoid *Grutter*'s narrow tailoring analysis.

> Where viewpoint diversity is the educational institution's goal, as in Grutter, . . . it makes sense to require an individualized, holistic assessment of candidates to determine how each may contribute to the overall educational or viewpoint diversity on campus. Lynn's interest, however, is not to achieve the benefits of viewpoint diversity.

Opposition Brief, p.12. The justification for racial diversity cannot be found in *Grutter*, which explicitly did

not adopt diversity measured by race alone as a compelling interest. *Grutter*, 539 U.S. at 336 ("each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application"). While *Grutter* does not support the racial diversity interest adopted by the First Circuit, the basic requirements of narrow tailoring applied in *Grutter* are applicable to all racial classifications. Despite this, the Respondents argue that these fundamental requirements of narrow tailoring are not applicable to racial diversity.

IV. Individualized Consideration

A. The individualized consideration test for narrow tailoring is not uniquely applicable to higher education or viewpoint diversity.

The Respondents mistakenly view individualized consideration as a unique feature added to the narrow tailoring analysis in *Grutter* and only applicable in like cases. This ignores this Court's previous application of the requirement in other settings unrelated to viewpoint diversity. Individualized consideration ensures the longstanding requirements that racial classifications be applied in a flexible manner and in a way that minimizes their impact. *United States* v. *Paradise*, 48 U.S. 149, 171 (1987). This requirement has been applied in cases wholly distinguishable from the discussion of viewpoint diversity of *Grutter*.

In *City of Richmond* v. *Croson*, 488 U.S. 469, 507-08 (1989), this Court rejected the use of a ridged numerical quota where individualized consideration of applicants could have been used to determine which businesses has been disadvantaged by prior discrimination. Again in *Adarand Constructors* v. *Peña*, 515 U.S. 200, 207, 238 (1995), this Court used individualized consideration as a measure of narrow tailoring when reviewing a policy that presumed that all minority owned businesses are socially and economically disadvantaged.

Requiring individualized consideration in contract set-aside cases is not intended to ensure a diversity of viewpoints among contractors. Individualized consideration is required to ensure flexible application of racial classifications and to minimize their impact on third parties – *i.e.* it ensures that race is used narrowly.

This requirement is all the more appropriate given that the Equal Protection Clause "protect[s] *persons*, not *groups*." *Grutter*, 539 U.S. at 326, *quoting*, *Adarand*, 515 U.S. at 227 (emphasis in original). When a racial classification does not include individualized consideration, it can only be based on consideration of the group at the expense of the individual. The testimony of Lynn's expert typifies this view:

> [I]n the name of trying to protect individual rights, you often destroy the benefit that everybody wants in common and the viability for community in serious ways. And so, in all public policy issues, there are these kinds of decisions that have to be made about individual and community rights and possibilities.

Trial Transcript, Day 4, 117:13-18 (Dr. Orfield). Such group-based decision-making is necessarily based on stereotyping in that it assumes that predominantly minority schools are inherently inferior or that minority children cannot learn and develop without sufficient exposure to white children.

> After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve.

Missouri v. *Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring).

B. Racial diversity is incompatible with individualized consideration.

When the goal is nothing more than racial diversity (*i.e.*, racial balancing) for its own sake, examination of the individual child loses much of its value as a tool for minimizing the impact of the racial classification. But that is only if you first adopt the idea that exposing our youngest citizens to racial classifications is a compelling interest; that it is permissible and even beneficial for government to view children as nothing more than members of a race and not as individuals with individual characteristics that are not dictated by skin color. It also requires ignoring this Court's previous admonitions against racial balancing for its own sake. *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992); *Grutter*, 539 U.S. at 330 ("outright racial balancing [] is patently unconstitutional"); *Swann*, 402 U.S. at 24 ("that approach would be disapproved and we would be obliged to reverse"). But, if the objective is an educational one, then examining how a child will or will not contribute to that interest is necessary in order to avoid the trap of racial stereotypes and to narrow the impact of the racial quota.

Respondents argue that individualized examination of Lynn's students is not necessary because, in their view, it is beneficial that Lynn evaluates its students based on nothing but their race. But this is the fatal flaw of racial diversity. Individualized consideration is incompatible with racial diversity because racial diversity is inherently incompatible with the Equal Protection Clause, which is designed to protect against government distinguishing between citizens based on nothing more than their race.

The purpose of the individualized consideration requirement is to ensure that government does not choose between individuals based on nothing more than the color of their skin. For example, in *Adarand* and *Croson* it ensured that the benefits of a remedial contract preference (had one been properly established) would not be distributed solely on race. Individualized consideration

ensures that such a remedial benefit would only be distributed to those who had been victims of discrimination within the relevant industry. *Adarand*, 515 U.S. at 207, 238; *Croson*, 488 U.S. at 507-08. In *Grutter*, the individualized consideration requirement prevented the law school from selecting applicants simply for belonging to the right race and required that they be selected based on how they would contribute to viewpoint diversity. *Grutter*, 539 U.S. at 316.

Under a racial diversity compelling interest, individualized consideration cannot fulfill this role because maintaining racial diversity requires doing exactly what narrow tailoring is meant to prevent – selecting individuals based on nothing more than the color of their skin. App.25 ("the Lynn Plan is designed to achieve racial diversity rather than viewpoint diversity. The only relevant criterion, then, is a student's race").

C. None of the factors listed by Lynn in their Opposition consider an individual child's effect on the classroom environment or act to minimize the impact of the racial quota.

The Respondents unpersuasively attempt to claim that the Plan does provide for some individualized consideration. But, the only considerations in denying a transfer request are class size and race. *En Banc Opinion*, App.7-8. The Respondents creatively argue:

> [B]efore race is used in a transfer decision, Lynn accounts for a number of individualized, race-neutral factors, including a student's place of residence, school attendance zones, a sibling's school assignment, whether a "neutral transfer" applies, class size, space availability, and the student's language or special education needs.

Even a cursory review of these "individualized, race-neutral factors" reveal this argument to be nonsense. The only factors that take into consideration the individual child are the student's language or special education

needs. Since the Lynn Plan only applies to regular education students, these factors merely determine if the child will be assigned to a bilingual or special education program. App.125 n.35 ("The Lynn Plan does not apply to school assignments for students participating in bilingual or special education programs").

The remaining factors do not examine the child's individual characteristics. Place of residence and school attendance zone simply go to whether the assignment sought would be a transfer request or would be considered the child's neighborhood school. Class size and space availability determines if there is a seat available for the child to request a transfer into. If there is an available seat and it is at a school that is not the child's neighborhood school, race alone will dictate whether or not the transfer will be granted.

The Respondents also list as a race neutral factor: "whether a 'neutral transfer' applies." This factor is not at all race-neutral. A neutral transfer is defined by race. It is a transfer between two schools that both fall within the +/- 10 or 15% proportional representation goal of the Plan. *En Banc Opinion*, App.7.

None of these factors are considered along with race in determining if an assignment will be granted. Race is a stand-alone determinative factor. The most important thing about these "individualized factors" is that they in no way examine how a child will, or will not, contribute to the claimed educational objective of the Plan. Other than demonstrating an extreme hardship (such as uniting siblings or medical or safety concerns (App.128)), there is simply no way for a child to overcome his or her race.

V. Lynn admits to the existence of at least one effective race neutral alternative.

The Respondents admit that "Lynn's three high schools have remained integrated without the [Plan's race-based] transfer restrictions." *Opposition Brief*, p.3. Lynn's high schools each fall within the racial quota of

+/-10% of the system-wide minority population; making transfers between the high school "neutral transfers" and not subject to the Plan's racial barriers. The three high schools achieve the proportional representation sought by the Lynn Plan by drawing from larger assignment zones coupled with the use of school choice ***without*** racial restrictions – demonstrating that Lynn's schools are capable of maintaining integration without the Plan's racial restrictions and that that the racial barriers are not the lest race restrictive alternative available.

VI. As acknowledged by all five judges of the First Circuit's *En Banc* Panel, their decision is not based on settled law.

The Respondents repeat, almost as a mantra, that the First Circuit's decision is based on "settled law." But the First Circuit itself disagrees with this assessment. *En Banc Opinion*, App.23 ("the Supreme Court has not yet considered a constitutional challenge to a voluntary race-based transfer policy for elementary and secondary schools" (majority opinion)); App.43 ("[t]he Lynn plan at issue in this case is fundamentally different from almost anything that the Supreme Court has previously addressed" (Boudin, C.J., concurring)); App.46 ("There is neither a Supreme Court decision squarely addressing whether racial diversity alone may constitute a compelling interest sufficient to justify the government's race-conscious preferences nor one addressing the narrow tailoring of racial classifications in voluntary, non-competitive school transfer plans" (Selya, J., dissenting)).

There is nothing settled about the question of whether public schools can assign children by skin color in order to maintain perpetual racial balance. *See*, *Freeman*, *supra*; *Swann*, *supra*. Because there are no cases directly on point, the circuit courts that have reviewed racial diversity assignment plans are sharply divided in their conclusions. *Compare*, *Eisenberg* v. *Montgomery County Public Schools*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*,

529 U.S. 1019 (2000) (striking down a non-remedial racial balancing assignment plan); *Tuttle* v. *Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999) (same); *Cavalier* v. *Caddo Parish School Board*, 403 F.3d 246 (5th Cir. 2005) (striking down racial balancing plan); *Doe* v. *Kamehameha Schools*, 416 F.3d 1029 (9th Cir. 2005) (finding that the mechanical inflexible use of race in school assignments violated 42 U.S.C. §1981) with *Brewer* v. *W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2nd Cir. 2000) (finding that racial diversity might be a compelling interest and remanding for findings on narrow tailoring); *McFarland* v. *Jefferson County Brd. of Educ.*, 416 F.3d 513 (6th Cir. 2005) (finding racial diversity to be compelling, but finding inflexible plan that lacked individualized consideration to be insufficiently narrowly tailored); *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005) (finding racial diversity to be compelling and finding inflexible plan that lacked individualized consideration to be sufficiently narrowly tailored); *Comfort*, App. 18-19 (finding diversity measured by race alone as a compelling interest and that an mechanically applied racial classification, which lacks individualized consideration to be narrowly tailored).

CONCLUSION

For each of these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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In the
Supreme Court of the United States

SAMANTHA J. COMFORT, on behalf of her Minor Child, Elizabeth Neumyer, et al.,

Petitioners,

v.

LYNN SCHOOL COMMITTEE, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, AMERICAN CIVIL RIGHTS INSTITUTE, AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The City of Lynn, Massachusetts, permits school choice within its public schools, but restricts participation on the basis of race. Under Lynn's plan, a transfer request will be denied if the transfer negatively affects the level of racial balance at the sending or receiving school. Racial balance is measured in terms of proportional representation to the system-wide minority student population. The only characteristic considered in granting or denying school choice requests is the race of the child. Lynn's plan does not include any individualized consideration.

The questions presented are:

1. Whether, in public elementary and secondary schools, achieving racial diversity is a compelling governmental interest sufficient to permit race-based restrictions on school assignments.

2. Whether a student assignment plan that mechanically and inflexibly restricts assignments based on the classifications "minority" and "non-minority" meets the Fourteenth Amendment's requirement of narrow tailoring.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF), the Center for Equal Opportunity (CEO), and the American Civil Rights Institute (ACRI) submit this brief amicus curiae in support of Petitioners Samantha J. Comfort, et al.[1] Letters of consent to file this brief were obtained from all parties and have been lodged with the clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purposes of engaging in litigation in matters affecting the public interest. PLF participated as amicus curiae in numerous United States Supreme Court cases relevant to the analysis of this case, including *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). PLF participated as amicus curiae in this case before the First Circuit Court of Appeals.

CEO and ACRI are nonprofit research, education, and public advocacy organizations. Amici devote significant time and resources to the study of the prevalence of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. They educate the American public about the prevalence of discrimination in American society. Amici publicly advocate the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. Amici have participated as

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

amicus curiae in numerous United States Supreme Court cases relevant to the analysis of this case.

This case raises important issues of constitutional law. Amici consider this case to be of special significance in that it concerns the fundamental issue of whether racial diversity in noncompetitive K-12 public schools may be a compelling governmental interest sufficient to justify discriminating against children.[2] Specifically, Amici will show that the rationale for promoting student body viewpoint diversity in institutions of higher education, as discussed in *Gratz*, 539 U.S. 244, and *Grutter*, 539 U.S. 306, simply has no counterpart in the context of elementary and secondary public schools. Amici believe that their public policy perspectives and litigation experiences provide an additional viewpoint on the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the First Circuit issued an *en banc* decision holding that noncompetitive elementary and secondary public schools may use race as the sole factor in assigning students to public schools without violating the Equal Protection Clause. In issuing its far-reaching decision, the court took it upon itself to extend the principles established in *Grutter*, 539 U.S. 306, for competitive law school admissions, into the setting of noncompetitive K-12 public schools. In doing so, the court calls into question the permissibility of considering race in this country's 94,000 K-12 public schools, which educate approximately 47.7 million students ranging from 5 to 18 years of age, and cost taxpayers about $401 billion a year.[3]

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[2] K-12 indicates kindergarten through 12th grade.

[3] Nat'l Ctr. for Educ. Statistics, *Information on Public Schools and*

(continued...)

There is more than a touch of irony in this case. By discounting the core concept of equal protection, public schools are sending the wrong message to our children—that racial discrimination is more important than individual rights and liberties in today's society. As the Fourth Circuit said:

> We find it ironic that a Policy that seeks to teach young children to view people as individuals rather than members of certain racial and ethnic groups classifies those same children as members of certain racial and ethnic groups.

Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 707 (4th Cir. 1999), *cert. dismissed*, 529 U.S. 1050 (2000). The central question before this Court is whether the federal Constitution permits this result.

No decision from this Court sanctions racial balancing. *Grutter*, 539 U.S. at 330. After *Grutter*, lower courts are in disarray on whether racial balancing to achieve racial integration in noncompetitive K-12 public schools meets strict scrutiny. The Ninth and Sixth Circuits applied *Grutter*'s educational benefits in university admissions to K-12 student assignment plans. These Circuits found that the benefits this Court attributed to educational diversity were similar to those that can be found in racially integrated K-12 public schools. In contrast, prior to *Grutter*, the First and Fourth Circuits observed that whether racial diversity was a compelling governmental interest remained an open question.

Grutter's viewpoint diversity rationale cannot be extended to racial diversity in noncompetitive, compulsory K-12 public schools. Racial diversity in K-12 is based on the idea that a child's skin color determines how that child thinks and behaves,

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[3] (...continued)
School Districts in the United States, CCD Quick Facts, *at* http://nces.ed.gov/ccd/quickfacts.asp (last visited Oct. 17, 2005).

a practice denounced as racial stereotyping. *Grutter*, 539 U.S. at 328-29. The Lynn Plan demands nothing more than proportional representation by pigmentation to achieve the school district's preferred racial mix of students. This racial balancing is constitutionally forbidden.

Instead of racial balancing, school districts should focus their efforts to include students from a wide variety of backgrounds through race-neutral means. Such practices would ensure broad educational opportunities to all their students without regard to irrelevant characteristics such as race.

STATEMENT OF THE CASE

For the 2001-2002 school year, approximately 15,500 children were enrolled in Lynn, Massachusetts' K-12 public schools. *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 7 (1st Cir. 2005). Far from revealing racially concentrated or racially isolated student bodies, each school has a diverse enrollment of minority and nonminority students ranging from 25% minority to 84% minority, reflecting Lynn's housing patterns.[4]

In 1989, Lynn implemented a voluntary desegregation plan that allows all students to attend neighborhood schools (the Lynn Plan). *Id.* at 7. Lynn encourages children to seek transfers to attend schools other than their neighborhood schools by setting up unique themes and programs at each school. *Id.* at 31 (Selya, J., dissenting). Race becomes a factor when a student seeks to transfer to another school. The transfer is permitted only if it will not increase the racial imbalance at either the sending or the receiving school. Under the Lynn

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[4] In the 2001-2002 school year, 42% of Lynn's students were "nonminority" or white and 58% were "minority" or nonwhite (15% black, 29% Hispanic, and 14% Asian). *Id.* at 7. Statistics of the Massachusetts Department of Education show that Lynn public schools would be racially diverse without the use of the Lynn Plan. *Available at* http://profiles.doe.mass.edu/home.asp?orgcode=01630000&view=enr (last visited Oct. 17, 2005).

Plan, a child classified as "white" may not receive a transfer if the school the child wishes to transfer from does not have "enough" "white" students. In contrast, a child classified as a "minority" may not receive a transfer if the school that child wishes to transfer into has "too many" "minority children."[5] *Comfort*, 418 F.3d at 8. The lower court provided the following example:

> Consider . . . two children, one white and one African-American, who are initially assigned to the same neighborhood elementary school for the 2001-02 school year. The school is racially isolated (i.e., less than 43% minority). Both children request a transfer to a nearby school that is racially imbalanced (i.e., greater than 73% minority). Under the Plan, the white student will be permitted to transfer, and the African-American student will not.

Id. The purpose of the discrimination is "to achieve the educational benefits of racial diversity" in the Lynn public schools. *Id.* at 5. Parents of children who were denied transfers filed a lawsuit claiming the Lynn Plan, among other things, violated their equal protection rights.

In a 3-2 decision, the lower court rejected the parents' claim by extending the analytic framework set out in this Court's recent higher education cases, *Grutter*, 539 U.S. 306, and *Gratz*, 539 U.S. 244, into the context of K-12 public schools. Although the court recognized that the law school plan in *Grutter* "focused on the advantages of viewpoint diversity in

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[5] A racially isolated elementary school is one where the percentage of minority students in the school falls 15% below or above the school district's overall minority composition in that school year. *Comfort*, 418 F.3d at 7. The Plan permits a 10% deviation for middle and high schools. *Id.* at 7. When a school falls within a percentage range, the school is classified as "neutral" or "racially balanced." *Id.* at 7.

the classroom," whereas "Lynn emphasizes the positive impact of racial diversity on student safety and attendance," these "differences do not negate a compelling interest in racial diversity in a K-12 setting." *Comfort*, 418 F.3d at 16. The court concluded that the school board had demonstrated a compelling interest in obtaining the benefits of a racially diverse student body in the K-12 setting. *Id.* at 16.

Turning to the "narrow tailoring" prong of strict scrutiny review, the court noted that this Court "has not yet considered a constitutional challenge to a voluntary race-based transfer policy for elementary and secondary schools." *Id.* at 17. Because the Lynn Plan concerns a transfer policy in K-12, the court ignored the *Grutter/Gratz* criteria relating to competitive admissions requirements in higher education. In rejecting the individualized consideration of applicants requirement, the lower court said: "The concerns motivating the individualized consideration requirement in a competitive, race-preferential admissions context that focuses on diversity along a number of axes (e.g., the *Gratz* and *Grutter* policies) are simply not present in a non-competitive K-12 transfer policy aimed at racial diversity." *Comfort*, 418 F.3d at 18.

Similarly, the court rejected the *Grutter* requirement that race was only one of many factors to be considered. There was "no reason to impose a blanket prohibition on the use of race as a *decisive* factor in a student transfer plan" to achieve racial diversity. *Comfort*, 418 F.3d at 19 (emphasis added). In addressing this Court's requirement that, "race conscious . . . policies must be limited in time," the court held that so long as Lynn does "periodic reviews to determine whether racial preferences are still necessary," the durational requirement is met. *Id.* at 22 (citation omitted).

The majority opinion generated a separate concurring opinion and a dissenting opinion. Both recognized the need for guidance from this Court. *Id.* at 27 (Boudin, C.J., concurring), *id.* at 29 (Selya, J., dissenting).

REASONS FOR GRANTING REVIEW

I

LOWER COURTS NEED GUIDANCE ON WHETHER RACIAL BALANCING TO ACHIEVE RACIAL DIVERSITY IN K-12 PUBLIC SCHOOLS MEETS STRICT SCRUTINY REQUIREMENTS

The First Circuit stated that guidance from this Court is needed to resolve whether and to what degree a school district may use race in student assignments. The concurring opinion noted that using race as the touchstone for transfers may send "the wrong lesson for school boards to teach and students to absorb." 418 F.3d at 28 (Boudin, C.J. concurring). Judge Boudin's handwringing concurrence recognized:

> If we knew how the Supreme Court would decide the case before us, it would be right to adopt its answer in advance—whatever this court's members might prefer. But where the outcome in the Supreme Court is uncertain and past pronouncements were made in contexts different than the one now presented, the appellate court must exercise its own judgment on whether the local plan is constitutionally forbidden.

Id. at 28 (Boudin, C.J., concurring). The dissent noted:

> There is neither a Supreme Court decision squarely addressing whether racial diversity alone may constitute a compelling interest sufficient to justify the government's race-conscious preferences nor one addressing the narrow tailoring of racial classifications in voluntary, non-competitive school transfer plans.

Id. at 29 (Selya, J., dissenting).

The question of where and how one draws the line on the use of race in assigning children to K-12 public schools has been resolved in different ways by the lower courts.

In the *en banc*, 7-4 Ninth Circuit opinion in *Parents Involved in Cmty. Schools v. Seattle Sch. Dist., No. 1*, No. 01-35450, 2005 WL 2679585 (9th Cir. Oct. 20, 2005) (*en banc*) (*PICS*), the court examined a school district plan to promote racial diversity in high schools. *Id.* at *2. The "open choice" plan allows ninth grade students to apply for assignment to any high school in the district. *Id.* at *4-*5. Because the schools varied significantly in quality, five high schools became "oversubscribed"—i.e., more students want to attend the school than there are spaces. To solve the problem, the district used a series of tiebreakers to determine which students to admit to oversubscribed schools. The ultimate tiebreaker was race. If an oversubscribed school's population deviated from the overall racial makeup of Seattle's students (40% white and 60% nonwhite) by more than a set percentage point, the race of the student determined whether to grant the student's request. Parents filed a lawsuit claiming that the transfer plan violated the students equal protection rights.

PICS recognized that "[a]lthough the Supreme Court has never decided a case involving the consideration of race in a voluntary imposed school assignment plan intended to promote racial and ethnically diverse secondary schools," *id.* at *7, *Grutter* provided the necessary constitutional analysis for allowing racial preferences for nonremedial purposes.

> [I]t would be a perverse reading of the Equal Protection Clause that would allow a university . . . to use race when choosing its student body but not allow a public school district . . . to consider a student's race in order to ensure that the high schools within the district attain and maintain diverse student bodies.

PICS, 2005 WL 2679585, at *9. Picking and choosing from *Grutter*'s hallmarks of narrow tailoring analysis, the Ninth Circuit found that the school district's racial tiebreaker program to be narrowly tailored. *PICS*, 2005 WL 2679585, at *13.

The majority opinion generated separate concurring and dissenting opinions. Judge Kozinski recognized that there is no decision from this Court squarely addressing whether racial diversity alone can constitute a compelling interest sufficient to justify government's race-conscious preference or one addressing narrow tailoring in voluntary noncompetitive K-12 public schools. Thus, the majority and dissent efforts in applying prior decisions from this Court were "unreal." "I hear the thud of square pegs being pounded into round holes. Ultimately, neither analysis seems entirely persuasive." *Id.* at *24 (Kozinski, J., concurring). However, Judge Kozinski then argued for a rational basis standard of review, giving deference to elected school officials beyond any deference warranted by this Court's opinions. *Id.* at *25.

The dissent found the program to be nothing more than "simple social balancing." *Id.* at *28 (Bea, C.J. dissenting). The dissent emphasized that "there is no *de minimis* exception to the Equal Protection Clause. Race discrimination is never a 'trifle.'" *Id.* at *29 (citation omitted). The dissent admonishes the majority for forgetting that "the Fourteenth Amendment protects individual rights, not the rights of certain races or groups." *Id.*

Like the Ninth Circuit, the Sixth Circuit applied *Grutter*'s compelling interest of student body diversity to a K-12 voluntary race-based student assignment plan. *McFarland v. Jefferson County Pub. Schools*, 416 F.3d 513 (6th Cir. 2005) (petition for rehearing and rehearing *en banc* pending). The Sixth Circuit issued a per curiam opinion affirming the district court's judgment. *McFarland v. Jefferson County Pub. Schools*, 330 F. Supp. 2d 834 (D. Ky. 2004). Although the district court noted that the "context of an elementary and

secondary school student assignment plan" was "slightly different" from the context of *Grutter*, *McFarland*, 330 F. Supp. 2d at 837, it found that the assignments implicated benefits that "are precisely those articulated and approved of in *Grutter*," *McFarland*, 330 F. Supp. 2d at 853. The *McFarland* court maintained that those benefits flowed specifically from the provision of "racially integrated public schools." *Id.*

Here, the First Circuit found the Lynn Plan to be narrowly tailored to the government's interest in obtaining the benefits of racial diversity. *Comfort*, 418 F.3d at 23. It declined to apply *Grutter*'s narrow tailoring requirements. "Unlike the *Gratz* and *Grutter* policies, the Lynn Plan is designed to achieve racial diversity rather than viewpoint diversity. The only relevant criterion, then, is a student's race." 418 F.3d at 18.

The Lynn Plan does not consider test scores, grades, letters of recommendation, or personal statements on how the individual student will contribute to student body diversity. The contrast with the Lynn Plan and the law school admissions plan could not be sharper. The Lynn Plan provides for none of the individualized consideration of the plan approved in *Grutter*, and it is even less flexible and more mechanical than the plan struck down in *Gratz*.

In contrast, prior to *Grutter*, three federal appellate court cases have held that nonremedial use of racial preferences in public schools violated the Equal Protection Clause. Those cases are *Wessmann v. Gittens*, 160 F.3d 790 (lst Cir. 1998); *Tuttle*, 195 F.3d 698, and *Eisenberg v. Montgomery County Pub. Schools*, 197 F.3d 123 (4th Cir. 1999). Each case observed that whether racial diversity was a compelling governmental interest remained an open question.

In *Wessmann*, the First Circuit examined a race-based admissions policy at three "examination schools," where race was made a determining factor. As the *Wessmann* court stated: "The question of precisely what interests government may

legitimately invoke to justify race-based classifications is largely unsettled." *Wessmann*, 160 F.3d at 795. The First Circuit assumed, without deciding, that racial diversity may in some cases be a compelling interest sufficient to justify the use of racial preferences in making student assignments. *Id.* at 796. The First Circuit then rejected the schools' claim:

> The Policy is, at bottom, a mechanism for racial balancing—and placing our imprimatur on racial balancing risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden. Nor does the School Committee's reliance on alleviating underrepresentation advance its cause. Underrepresentation is merely racial balancing in disguise—another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions.

Id. at 799 (citations omitted).

In *Tuttle*, 195 F.3d 698, the Fourth Circuit examined whether an oversubscribed public school may use a weighted lottery in admissions to promote racial and ethnic diversity in its student body. The court stated that "[u]ntil the Supreme Court provides decisive guidance, we will assume, without so holding, that diversity may be a compelling governmental interest and proceed to examine whether the Policy is narrowly tailored to achieve diversity." *Id.* at 705.

In *Eisenberg*, 197 F.3d 123, the court addressed whether a school district may deny a student's request to transfer to a magnet school because of his race. The court stated: "*Tuttle* notes that whether diversity is a compelling governmental interest remains unresolved, and in this case, we also choose to leave it unresolved." *Id.* at 130.

Both the First Circuit in *Wessmann* and the Fourth Circuit were careful to point out that the type of racial diversity that

may be constitutional was different from racial balancing pursued for its own sake. Justice Powell described the type of diversity that may be deemed a compelling interest. As explained in *Wessmann*:

> "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." A single-minded focus on ethnic diversity "hinders rather than furthers attainment of genuine diversity."

Wessmann, 160 F.3d at 798 (quoting *Bakke*, 438 U.S. at 315 (Powell, J., opinion)).

Applying this analysis, *Wessmann*, *Eisenberg*, and *Tuttle* held that the racial preferences at issue were not narrowly tailored to serve the potentially compelling interest of student body diversity. The Fourth Circuit in *Eisenberg* found:

> In fact, we find that it is mere racial balancing in a pure form, even at its inception . . . . The transfer policy is administered with an end toward maintaining this percentage of racial balance in each school. This is, by definition, racial balancing. As we have only recently held in *Tuttle*, "such nonremedial racial balancing is unconstitutional." . . . Although the transfer policy does not necessarily apply "hard and fast quotas," its goal of keeping certain percentages of racial/ethnic groups within each school to ensure diversity is racial balancing.

197 F.3d at 131 (citation and footnotes omitted).

As discussed above, *Wessmann*, *Eisenberg*, *Tuttle*, and *McFarland*, together with *Gratz*, *Grutter*, and *Bakke*, lead to the conclusion that narrowly tailoring a racial preference program at the K-12 level is impossible.

> It is challenging enough to determine what elements of "diversity" a young adult, who has had time to gain some modicum of life experience, might bring to a law school class. It would be absurd to presume the ability to make such a determination for students in the public K-12 setting. Instead of conducting a thorough examination of relevant individual characteristics, schools would likely resort to race as a proxy for "the diversity that furthers a compelling state interest which encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."

J. Kevin Jenkins, Ed.D., *Grutter, Diversity, and Public K-12 Schools*, 182 Educ. Law. Rep. 353, 368 (2004) (citation omitted).

This Court should grant the Petition for Writ of Certiorari to ensure that public schools provide educational opportunities to all their students without regard to irrelevant characteristics such as race.

II

THE DECISION BELOW MISCONSTRUED *GRUTTER*

This Court has never held that noncompetitive, compulsory K-12 public schools may voluntarily discriminate against children on the basis of race to achieve racial diversity. Nonetheless, the lower court extended the rationale in *Grutter* in an attempt to justify the use of racial discrimination against children. The lower court claimed that although there are differences between racial diversity and the viewpoint diversity approved in *Grutter*, they are merely "two sides of the same coin." *Comfort*, 418 F.3d at 14.

> There are, of course, some variances between the benefits sought. For example, the law school plan at issue in *Grutter* focused on the advantages of viewpoint diversity in the classroom, while Lynn emphasizes the positive impact of racial diversity on student safety and attendance. But it is natural that safety and attendance issues will loom larger in elementary and secondary schools than in graduate schools. Conversely, lively classroom discussion is a more central form of learning in law schools (which prefer the Socratic method) than in a K-12 setting. These differences do not negate a compelling interest in racial diversity in a K-12 setting. Instead, they are the logical result of context.

Id. at 16.

As this Court emphasized in *Grutter*, "[c]ontext matters when reviewing such [race-based] action." *Grutter*, 539 U.S. at 308. Thus, it is difficult to see how such differences between racial diversity and viewpoint diversity are not fatal to the lower court's analysis.

First, this Court granted *certiorari* in *Grutter* to resolve "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public *universities*." *Grutter*, 539 U.S. at 322 (emphasis added).[6] *Grutter* did not address whether racial diversity can be a compelling interest that justifies the use of race in K-12.

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[6] To emphasize that context is limited to public *universities*, this Court noted: "Compare *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that diversity is not a compelling state interest), with *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000) (holding that it is)." *Grutter*, 539 U.S. at 322.

Second, context is crucial. *Grutter*'s compelling interest analysis was expressly limited to the use of race in admissions in the context of "the expansive freedoms of speech and thought associated with the university environment . . . a special niche in our constitutional tradition." *Grutter*, 503 U.S. at 329; *accord Bakke*, 438 U.S. at 312 (Powell, J., opinion) (A university's First Amendment right to "[a]cademic freedom" includes "[t]he freedom of the university to make its own judgments as to education" and "the selection of its student body.").

Grutter's compelling state interest analysis simply has no counterpart in K-12 public schools. First, students in elementary and secondary schools have a right to admission. *Goss v. Lopez*, 419 U.S. 565, 574 (1975). Second, the educational mission of K-12 public schools is different from that of universities. The purpose of American public schools is to *teach* fundamental values necessary to maintain a democratic system. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). *See, e.g.*, Kevin G. Welner, *Locking up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. Rev. 959, 965 (2003) (Public school "[e]ducation is inculcation, not exposure."). K-12 public schools prepare students for citizenship, which includes teaching the principles of our Constitution. *Bethel Sch. Dist.*, 478 U.S. at 681. Such instruction necessarily includes less emphasis on the "robust exchange of ideas" in elementary and secondary school education. Joint Statement of Constitutional Law Scholars, The Civil Rights Project at Harvard University, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases* 23 (2003), *available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf (last visited Oct. 4, 2005).

At bottom, the Lynn Plan is nothing but a mechanism for racial balancing where the school district demands nothing

more than proportional representation by pigmentation to achieve the district's preferred racial mix of students. This Court should grant *certiorari* to clarify that the compelling state interest identified in *Grutter* does not apply to K-12 public schools.

III

REVIEW IS NECESSARY TO CLARIFY THAT RACIAL BALANCING TO PROMOTE RACIAL DIVERSITY IN K-12 PUBLIC SCHOOLS OFFENDS THE EQUAL PROTECTION CLAUSE

The lower court held that the Lynn Plan's use of race to promote racial diversity does not violate the Equal Protection Clause. *Comfort*, 418 F.3d at 6. Under the Lynn Plan, race is the sole determinative factor in approving or denying a transfer request. Although the Equal Protection Clause permits some racial classifications under the most limited circumstances, it does not allow racial balancing for the sole purpose of achieving a specified "racial mix" of students that a school district believes is desirable. *Grutter* reaffirmed:

> Because the Fourteenth Amendment protects *persons*, not *groups*, all governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.

Grutter, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227) (internal quotation marks and citations omitted; emphasis in original). *See also Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.").

In *Adarand*, this Court reiterated that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand*, 515 U.S. at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). This Court stated that free people "should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons." *Adarand*, 515 U.S. at 227. This intolerance is necessary because government racial discrimination of any sort is inherently suspect, since racial characteristics are almost never an appropriate consideration for the government. *Id.* at 216.

> [T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," and subject to the "most rigid scrutiny," and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose.

Id. (citations omitted). This includes neutral policies that "burden or benefit the races equally." *Shaw v. Reno*, 509 U.S. 630, 651 (1993). Indeed, this Court rejected the notion that separate can ever be equal—or "neutral"—in *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), and refused to resurrect it in *Johnson v. California*, 125 S. Ct. 1141, 1143 (2005).

The lower court misses this point. The Lynn Plan is a mechanism to achieve a preferred racial mix of students. This is nothing more than "racial balancing, which is patently unconstitutional." *Grutter*, 539 U.S. at 330. As the dissent recognized:

> There is a harm inflicted on a student when her government denies her transfer for the *sole* or determinative reason of race—an immutable

> condition that she cannot change. That harm cannot be ignored simply because it serves what others (be they school committee members or my distinguished colleagues) perceive as a greater good.

Comfort, 418 F.3d at 31 (Selya, C.J., dissenting).

Race should play no determinative role in assigning students to noncompetitive, compulsory K-12 public schools. Unlike viewpoint diversity in the competitive admissions process of universities, racial diversity in K-12 contradicts, rather than furthers, the aims of equal protection. It is being used simply to achieve racial balancing. This Court should address the important national issue of whether the use of race to promote racial diversity in K-12 public schools violates the Equal Protection Clause.

IV

SCHOOL DISTRICTS REMAIN FREE TO ADDRESS RACIALLY IMBALANCED SCHOOLS THROUGH RACE-NEUTRAL MEANS

Although "narrow tailoring dictates that the government use race only when necessary to achieve a compelling interest," *Comfort*, 418 F.3d at 22, the court found that the school district need only "demonstrate a good faith effort to consider feasible race-neutral alternatives." *Id.* at 23.

School districts should not be allowed to rely on *Grutter* to shelter unconstitutional programs. Instead, they should ensure broad educational opportunities to all students without regard to irrelevant characteristics such as race.

> Perhaps in lieu of spending time and money on racial balancing schemes, public school officials could better use the resources trusted to their care by focusing on the problems that currently exist in many

> schools serving disadvantaged students. Addressing deficiencies in neighborhood schools would allow interested students the opportunity to prepare for higher education and to compete for admission on equal footing, without the accompanying stigma and resentment associated with racial preferences.

Jenkins, *supra*, at 369-70.

Moreover, there is nothing prohibiting school districts from addressing racially imbalanced schools through race-neutral means. The United States Department of Education, Office for Civil Rights identifies numerous "innovative 'race-neutral' alternatives" to encourage diversity "to ensure that their student bodies are accessible to people from a wide variety of backgrounds." Office for Civil Rights, U.S. Dep't of Educ., *Achieving Diversity: Race-Neutral Alternatives in American Education* (2004), *available at* http://www.ed.gov/about/offices/list/ocr/raceneutral.html (overview) and http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html (report) (last visited Oct. 25, 2005). Examples include:

- Providing preferences on the basis of socioeconomic status (SES). These plans seek to reduce concentrations of poverty. The use of SES would provide

> all students a chance to attend middle-class schools, in which a majority of students set the tone that academic achievement is to be valued and that aspirations should be set high, students learn from one another's differences, misbehavior is kept under control and does not become contagious, and teachers are not overwhelmed by large numbers of high-need students.

Id. at 34 (citation omitted).

- Creating many new "skills development" programs—projects designed to improve educational

achievement among students who attend traditionally low-performing schools.

- Low performing schools entering into partnership with universities to strengthen their students' ability to succeed in college.

Using race for the sole purpose of achieving racial diversity is prohibited by the Equal Protection Clause. Our children deserve to be treated as individuals, not as members of racial groups. This Court should grant *certiorari* to determine where and how one draws the line on the basis of race in noncompetitive compulsory K-12 public schools.

CONCLUSION

The decision of the First Circuit Court of Appeals upholding the use of race in noncompetitive elementary and secondary public schools conflicts with the decisions of this Court and of other courts of appeals interpreting the Fourteenth Amendment's Equal Protection Clause. The Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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